SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 213.

A. D. JAMES, UNITED STATES MARSHAL FOR THE WESTERN DISTRICT OF KENTUCKY, AND THE UNITED STATES, APPELLANTS,

vs.

HENRY BOWMAN.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

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1 Proceedings of the district court of the United States for the western district of Kentucky, at a regular term begun and held at the Federal court hall, in the city of Louisville, on Monday, October 14th, A. D. 1901.

Present, Honorable Walter Evans, judge.

In re Henry Bowman, ex parte.

This day came Henry Bowman, by W. B. Dixon, his counsel, and filed his petition herein, and on his motion it is ordered that a writ of habeas corpus do issue directed to the United States marshal for the western district of Kentucky, returnable November 16, 1901.

The petition above referred to is as follows:

To the honorable district court of the United States for the western district of Kentucky:

PETITION FOR WRIT OF HABEAS CORPUS.

The petitioner, Henry Bowman, respectfully shows to this honorable court that he is unjustly and unlawfully detained and imprisoned by the marshal of the United States for the western district of Kentucky, by virtue of a warrant of commitment issued by the clerk of the United States district court for the western district of Kentucky, which said writ of commitment, issued on and by virtue of an indictment numbered 6734, pending in said court against this petitioner and charging him with having prevented, hindered, controlled, and intimidated another from exercising and in exercising the right of suffrage to whom that right is guaranteed by the fifteenth amendment to the Constitution of the United States, by means of bribery, and in violation of section 5507 of

2 the Revised Statutes of the United States, which section is contrary to and in violation of the Constitution of the United States and is void.

Wherefore, to be relieved of said unlawful detention and imprisonment, your petitioner prays that a writ of habeas corpus, to be directed to said marshal of the United States for the western district of Kentucky, may issue in this behalf, so that your petitioner may be forthwith brought before this court to do, submit to, and receive what the law may require.

his
HENRY x BOWMAN, *Petitioner.*
mark

UNITED STATES OF AMERICA,
Western district of Kentucky:

Henry Bowman, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition subscribed by him; that he has read the same and knows the contents thereof, and that the statements therein made are true as he verily believes.

his
HENRY x BOWMAN, *Petitioner.*
mark

Subscribed and sworn to this 14th day of November, 1901.

HENRY F. CASSIN, *U. S. Comr.*

The writ above referred to is as follows:

The President of the United States of America to the marshal of the United States for the western district of Kentucky:

You are hereby commanded to produce before the judge of the district court of the United States for the western district of Kentucky, at Louisville, on the 16th day of November, 1901, at 10 o'clock in the forenoon, the body of Henry Bowman, illegally detained by you, as is alleged, together with the nature and cause of his detention, and then and there to abide such orders as may be made in the premises, and have you then and there this writ; and this you shall in no wise omit, under the penalty in such case demanded.

Witness the honorable Walter Evans, judge of the said district court of the United States, at the city of Louisville, this 14th day of November, 1901, and of our Independence the 126th year.

[SEAL.] THOS. SPEED, *Clerk.*

3 Upon which appeared the following return:

I hereby accept service of the within writ of habeas corpus: This Nov. 14, 1901.

A. D. JAMES, *U. S. Marshal.*

And on the 16th day of November, 1901, came the respondent, A. D. James, United States marshal for the western district of Kentucky, and in open court filed his return in writing to the writ of habeas corpus herein. He also produced in court the body of the relator, Henry Bowman, and thereupon the relator, Henry Bowman, by his counsel, William B. Dixon, produced and filed a reply to the said response, and respondent, by R. D. Hill, United States district attorney for the western district of Kentucky, filed a demurrer to said reply, and this cause being submitted on said demurrer, and upon said motion of said Henry Bowman, by his counsel, W. B. Dixon, for judgment of discharge upon the writ, the return thereof, the reply thereto, and the demurrer to said reply, to which the respondent, by his attorney, R. D. Hill, United States district attorney, as aforesaid, objected; and this cause being now set down for hearing, and the matters of law arising on said demurrer and motion having been argued by said counsel, and the court being fully advised thereof, delivered a written opinion, which is ordered to be filed, and made a part of this record, and in accordance therewith and in obedience to the ruling of the circuit court of appeals referred to therein, which holds section 5507 of the Revised Statutes to be repugnant to the Constitution of the United States, it is adjudged by the court that the imprisonment and detention of the relator, Henry Bowman, by the respondent, A. D. James, United States marshal for the western district of Kentucky, to answer the indictment referred to and made part of said response, is in violation of the Constitution and laws of the United States; and it is therefore, and in obedience to the said ruling of said circuit court of appeals, ordered that the relator, Henry Bowman, be, and he is hereby, discharged of the premises, and that he go hence without day. To all of which the said respondent, A. D. James, and the United States of America, each excepts.

4 The response above referred to is as follows:

To the honorable the United States district court for the western district of Kentucky:

In the matter of Henry Bowman, on proceedings for habeas corpus.

The undersigned, A. D. James, United States marshal for the western district of Kentucky, for response and return to the writ of habeas corpus served on him herein, says he has in his custody the said Henry Bowman, whom he presents before this honorable court, as directed by the writ, and for the cause and time of his detention and imprisonment says that on the first day of December, 1900, a grand jury, which had then and there been duly and legally impaneled and sworn in and for the district of Kentucky, and by the United States district court of said district at Louisville, Kentucky, returned and filed in open court an indictment against Harry Weaver and Henry Bowman, a duly certified copy of which indictment is filed herewith, as part hereof, marked "A." That said indictment is now pending in the United States district court for the western district of Kentucky and has never been tried, stricken from the docket, or disposed of in any way.

Your respondent further states that on the 14th day of November, 1901, an order was entered by the U. S. district court in said case of United States vs. Harry Weaver and Henry Bowman, directing that said Henry Bowman be committed to the custody of your respondent as United States marshal aforesaid, in default of a bail bond in the sum of $750.00 for the appearance of said Henry Bowman in said court at the marshal term thereof, 1902, to answer the charge against him, contained in said indictment, a duly certified copy of which order is filed herewith as part hereof, marked "B."

Your respondent states that the said Henry Bowman is now in his custody, and is being detained by your respondent, under and by virtue of said order of court, and under and by virtue of said indictment. That in and by said indictment the said Harry Weaver and Henry Bowman

5 are duly and legally charged with having wilfully, knowingly, and unlawfully prevented, hindered, and controlled Louis Anderson, Phil Bosket, Link Birdine, William Wagner, C. C. Overall, D. Blackburn, Dan Louis, James McGary, Thomas Turner, Ed Whallen, and divers other persons to the grand jurors unknown, citizens and voters of the city of Louisville, State of Kentucky, from exercising and in exercising the right of suffrage and the right to vote at an election duly and legally held in Jefferson County, in the State of Kentucky, on the 8th day of November, 1898, and in the Fifth Congressional district of the State of Kentucky, which said district was then and there composed of the county of Jefferson, in said State, by means of bribery, and by then and there bribing and giving to the said Louis Anderson, Phil Bosket, Link Birdine, William Wagner, C. C. Overall, D. Blackburn, Dan Louis, James McGary, Thomas Turner, Ed Whallen, and said divers other persons to the grand jurors unknown, lawful money of the United States, not to vote and not to exercise the right of suffrage at said election; that said Harry Weaver and Henry Bowman did then and there bribe and give to the said Louis Anderson, Phil Bosket, Link Birdine, William Wagner, C. C. Overall, D. Blackburn, Dan Louis,

James McGary, Thomas Turner, Ed Whallen, and divers other persons to the grand jurors unknown, and each of them, fifty cents in lawful money of the United States, a further description of which said money was to said grand jurors unknown, not to exercise the right of suffrage, and not to vote at said election.

And your respondent submits the question to your honor and the courts regularly appointed under the law of the United States for the exercise of judicial functions, and asks that the writ against him be discharged.

A. D. JAMES.

Subscribed and sworn to before me this November 16, 1901.

HENRY F. CASSIN,
U. S. Comr. Western Dist. of Ky.

6 The Exhibit A above referred to is as follows:

UNITED STATES OF AMERICA,
District of Kentucky, set:

In the district court of the United States for the sixth judicial circuit and district of Kentucky, held at Louisville, Kentucky, October term, in the y'ar of our Lord nineteen hundred.

The grand jurors of the United States of America, impaneled and sworn and charged to inquire in and for the district of Kentucky on their oaths present, that on the eighth day of November, in the year of our Lord eighteen hundred and ninety-eight, in Jefferson County, in the district aforesaid, and within the jurisdiction of this court, an election was duly and legally held under and pursuant to the laws of the United States and of the State of Kentucky in all of the voting precincts of the Fifth Congressional district of Kentucky, and that the said Fifth Congressional district of Kentucky was then and there composed of the county of Jefferson, in Kentucky, and that Louis Anderson, Phil Bosket, Link Birdine, William Wagner, C. C. Overall, D. Blackburn, Dan Louis, James McGary, Thomas Turner, Ed Whallen, and divers other persons whose names are to the grand jurors aforesaid unknown, were then and there men of African descent, colored men, negroes, and not white men, and were then and there male citizens of the United States and of the State of Kentucky, of the age of twenty-one years and upwards, and were then and there duly and legally registered under the laws of the United States and of the State of Kentucky, and were then and there duly and legally qualified under the laws of the United States and of the State of Kentucky to vote at said election then and there held for the election of said Representative in said 56th Congress of the United States from the said 5th Congressional district of Kentucky, and were then and there duly and legally qualified under the laws of the United States and of the State of Kentucky to vote for a Representative in said 56th Congress of the United States from said 5th Congressional district of Kentucky, as Harry Weaver and Henry Bowman then and there knew; and that the said Louis Anderson, Phil Bosket, Link Birdine, William Wagner, C. C.

7 Overall, D. Blackburn, Dan Louis, James McGary, Thomas Turner, Ed Whallen, and the said divers other persons whose names are to the grand jurors aforesaid unknown, were then and

there residents of the State of Kentucky and of the county of Jefferson, and had then and there resided in said State for more than one year and in said county of Jefferson for more than six months next preceding said election; and that the said Louis Anderson was then and there a resident of the fifteenth voting precinct in the Fifth Ward in the city of Louisville, in said county and Congressional district, and had then and there resided in said fifteenth voting precinct for more than sixty days next preceding said election, and was then and there duly and legally registered under the laws of the United States and the State of Kentucky in said fifteenth voting precinct, and was then and there entitled to vote in said fifteenth voting precinct at said election; and that the said Phil Bosket was then and there a resident of the fifteenth voting precinct in the Fifth Ward in the city of Louisville, in said county and Congressional district, and had then and there resided in said fifteenth voting precinct for more than sixty days next preceding said election, and was then and there duly and legally registered under the laws of the United States and of the State of Kentucky in said fifteenth voting precinct, and was then and there entitled to vote in said fifteenth voting precinct at said election;

And that the said Link Birdine was then and there a resident of the sixteenth voting precinct in the Fifth Ward in the city of Louisville, in said county and Congressional district, and had then and there resided in said sixteenth voting precinct for more than sixty days next preceding said election, and was then and there duly and legally registered under the laws of the United States and of the State of Kentucky in said sixteenth voting precinct, and was then and there entitled to vote in said sixteenth voting precinct at said election;

And that the said William Wagner was then and there a resident of the fifteenth voting precinct in the Fifth Ward in the city of Louisville, in said county and Congressional district, and had then and there resided in said fifteenth voting precinct for more than sixty days next preceding said election, and was then and there duly and legally registered
8 under the laws of the United States and of the State of Kentucky in said fifteenth voting precinct, and was then and there entitled to vote in said fifteenth voting precinct at said election;

And that the said C. C. Overall was then and there a resident of the thirtieth voting precinct in the Third Ward in the city of Louisville, in said county and Congressional district, and had then and there resided in said thirtieth voting precinct for more than sixty days next preceding said election, and was then and there duly and legally registered under the laws of the United States and of the State of Kentucky in said thirtieth voting precinct, and was then and there entitled to vote in said thirtieth voting precinct at said election;

And that the said D. Blackburn was then and there a resident of the twenty-first voting precinct in the Fifth Ward in the city of Louisville, in said county and Congressional district, and had then and there resided in said twenty-first voting precinct for more than sixty days next preceding said election, and was then and there duly and legally registered under the laws of the United States and of the State of Kentucky in said twenty-first voting precinct, and was then and there entitled to vote in said twenty-first voting precinct at said election;

And that the said Dan Louis was then and there a resident of the fifteenth voting precinct in the Fifth Ward in the city of Louisville, in said county and Congressional district, and had then and there resided in said fifteenth voting precinct for more than sixty days next preceding said election, and was then and there duly and legally registered under the laws of the United States and of the State of Kentucky in said fifteenth voting precinct, and was then and there entitled to vote in said fifteenth voting precinct at said election;

And that the said James McGary, Thomas Turner, and Ed Whallen were then and there residents of the fourth voting precinct in the Eighth Ward in the city of Louisville, in said county and Congressional district, and had then and there resided in said fourth voting precinct for more than sixty days next preceding said election, and were then and there duly and legally registered under the laws of the United States and of the State of Kentucky in said fourth voting precinct, and were
9 then and there entitled to vote in said fourth voting precinct at said election;

And that each of said divers other persons, citizens, and voters as aforesaid, whose names are to the grand jurors aforesaid unknown, was then and there a resident of one of the voting precincts in said congressional district, and had then and there resided in said voting precinct for more than sixty days next preceding said election, and was then and there duly and legally registered under the laws of the United States and of the State of Kentucky in and was then and there entitled to vote at said voting precinct at said election, but that the voting precinct in which each of said divers other persons whose names are to the grand jurors aforesaid unknown, then and there resided, and had then and there so as aforesaid resided, and in which each of said divers other persons whose names are to the grand jurors aforesaid unknown, were then and there registered and entitled to vote at said election, are unknown to the said grand jurors, as the said Harry Weaver and Henry Bowman then and there knew; and that the said Louis Anderson, Phil Bosket, Link Birdine, William Wagner, C. C. Overall, D. Blackburn, Dan Louis, James McGary, Thomas Turner, Ed Whallen, and said divers other persons whose names are to the grand jurors aforesaid unknown, citizens and voters as aforesaid, were then and there persons to whom the right of suffrage and the right to vote was then and there guaranteed by the fifteenth amendment to the Constitution of the United States, as the said Harry Weaver and Henry Bowman then and there knew.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said Harry Weaver and Henry Bowman did then and there unlawfully, wilfully, and knowingly prevent, hinder, control, and intimidate the said Louis Anderson, Phil Bosket, Link Birdine, William Wagner, C. C. Overall, D. Blackburn, Dan Louis, James McGary, Thomas Turner, Ed Whallen, and said divers other persons to the grand jurors aforesaid unknown, citizens and voters as aforesaid, from then and there exercising and in then and there exercising the right of suffrage and the right to vote at said election by means of bribery, and by then and there bribing and giving to the said Louis Anderson, Phil Bosket, Link Birdine, William Wagner, C. C. Overall,

D. Blackburn, Dan Louis, James McGary, Thomas Turner,
10 Ed Whallen, and divers other persons to the grand jurors aforesaid unknown, citizens and voters as aforesaid, lawful money of the United States, not to exercise the right of suffrage at said election; and that the said Harry Weaver and Henry Bowman did then and there bribe and give to the said Louis Anderson, Phil Bosket, Link Birdine, William Wagner, C. C. Overall, D. Blackburn, Dan Louis, James McGary, Thomas Turner, Ed Whallen, and the said divers other persons to the grand jurors aforesaid unknown, citizens and voters as aforesaid, and each of them fifty cents in lawful money of the United States, a further description of which said money is to the grand jurors aforesaid unknown, not to exercise the right of suffrage and not to vote at said election.

Against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided.

R. D. HILL,
U. S. Attorney, District of Kentucky.

Witnesses: Louis Anderson, Phil Bosket, William Wagner, Dan Louis, D. Blackburn, James McGary, Thomas Turner, Ed Whallen, C. C. Overall, Isaac Curtis, George Richardson, Willis Smith, Ben Kendall, Elias Jenkins.

The Exhibit B above referred to is as follows:

In the district court of the United States for the western district of Kentucky, November 14th, 1901.

UNITED STATES
vs.
HARRY WEAVER AND HENRY BOWMAN.

It is further ordered by the court that the defendant, Henry Bowman, be committed to the custody of the marshal in default of bail in the sum of $750.00 for his appearance herein at the next term of this court.

11 The reply above referred to is as follows:

To the honorable the United States District Court for the Western District of Kentucky:

In the matter of Henry Bowman, on proceedings for habeas corpus.

REPLY.

The petitioner, Henry Bowman, for reply to the response of A. D. James, United States Marshal for the Western District of Kentucky, filed herein on this day, says that the indictment, copy of which is made a part of the response of said A. D. James, is based on section 5507 of the Revised Statutes of the United States, which section reads as follows:

"Every person who prevents, hinders, controls, or intimidates another from exercising or in exercising the right of suffrage, to whom that right is

guaranteed by the fifteenth amendment to the Constitution of the United States, by means of bribery or threats of depriving such person of employment or occupation or of ejecting such person from a rented house, lands, or other property, or by threats of refusing to renew leases or contracts for labor, or by threats of violence to himself or family, shall be punished as provided in the preceding section."

Now the said petitioner alleges that said section is in violation of the Constitution of the United States; that the Congress had no power, under the Constitution of the United States, to enact said section, or any part thereof, and that same is absolutely void and of no effect.

his
HENRY x BOWMAN.
mark

Subscribed and sworn to before me this 16th day of November, 1901.

HENRY F. CASSIN,
U. S. Commissioner.

12 The demurrer to reply above referred to is as follows:

To the honorable the United States District Court for the Western District of Kentucky:

In the matter of Henry Bowman, on proceedings for habeas corpus.

DEMURRER TO REPLY.

Respondent, A. D. James, comes and demurs to the reply of Henry Bowman, because the facts stated in said reply are not sufficient to constitute a defense or a reply to the matters set out in the response of said James, and upon that the said James prays the judgment of the court.

A. D. JAMES.

Subscribed and sworn to before me this 16th day of November, 1901.

HENRY F. CASSIN,
U. S. Com'r.

The opinion above referred to is as follows:

13 [Not for publication.]

United States district court, western district of Kentucky.

In the matter of Henry Bowman, ex parte.

OPINION.

By the petition in this case, Henry Bowman prays that he may be discharged from the custody of the marshal upon the ground that his detention by that officer is in violation of the Constitution and laws of the United States. The petitioner is in the custody of the marshal under an order of commitment in default of bail to answer an indictment against him in this court wherein he is charged with an offense against the United States under section 5507 of the Revised Statutes, and which provision of the Statutes he insists is repugnant to the Constitution and void.

To certain indictments then pending in this court, among them being that of the United States vs. Lackey, demurrers were filed some time since, and the question of the constitutionality of sections 5507 and 5508, R. S., was very carefully considered and passed upon by me. Having, as a young man, gone through the most momentous period in the history of the country and the agitations and discussions then in progress, and which resulted in the adoption of the 13th, 14th, and 15th amendments, and having been thoroughly in sympathy with the efforts to do so, I felt some capacity from recollections of that agitation and of those discussions to interpret the spirit and purposes of the people which brought about the amendments themselves and the legislation enacted to enforce them. In my efforts to construe these laws I received some aid from those recollections, and after a very careful investigation of the whole subject, in an opinion then delivered in those cases, I said:

14 The indictment in the first of the cases named is for a violation of section 5507, and that in the second is for a violation of section 5508, of the Revised Statutes of the United States; all the aggrieved persons being men of color, of the African race, and the wrongs committed being charged to have been committed on account of that fact. A demurrer has been interposed to each indictment, and as a decision in both cases depends in a large measure upon the same principles, they may conveniently be disposed of in one opinion.

When the statutory provisions referred to are considered solely with reference to the meaning of the language used, and with regard to the general purpose to be accomplished, we find that Congress intended to protect the right of suffrage, and to prevent its abridgement or denial by prescribing, first, in section 5507, punishment for those who, by means of bribery or certain forms of threats, either prevented, hindered, controlled, or intimidated a described class of persons from exercising or in exercising the right of suffrage, namely, those persons, but only those persons, to whom that right was guaranteed by the Fifteenth amendment to the Constitution; and, second, in section 5508, by prescribing punishment for those who conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise and enjoyment of any right or privilege secured to him by the Constitution or laws of the United States. There would be some hardihood in a serious contention that either of the objects disclosed by this analysis of the sections referred to was, per se, wrong, or fairly subject to any just criticism. On the contrary, those objects are manifestly just and commendable in the estimation of every right-thinking man. When we go further, and consider that the purpose, in some important respects, was to assist in guarding the right to vote so recently given by the nation itself to a certain class of its citizens, it suggests the reflection that free and fair elections, at which the honest, intelligent, and uncontrolled choice of the qualified voters of the community shall be fairly ascertained and announced, are the only sure foundations of free institutions and the only real guaranty of the liberties of the people. If the first are systematically denied or prevented, the

15 others may be sooner or later overthrown. True, under our form of government the State authorities must, for the most part, enforce and preserve these safeguards; but so essential to our happiness are honest and free elections, that if the Federal authorities, acting within

their proper sphere, can in any way help to secure them, they should not omit or neglect to do so. With these general propositions before us, we come to the consideration of the principal objection raised to the indictments, to wit, that Congress had no constitutional power to enact the legislation referred to; and we proceed to its investigation, but, with the exception of one case under section 5507, without any express adjudications to guide us upon the exact points involved in these cases.

On July 28, 1868, the Secretary of State proclaimed that the fourteenth article of amendments to the Constitution of the United States had been ratified by three-fourths of the States of the Union. The first section thereof emphatically declared that "all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside." The instantaneous effect of this was to make all the persons described in the first section citizens alike of the United States and of the States wherein they lived. It required no legislation by Congress to perfect this right. The amendment itself, of its own force, achieved the object. This much being accomplished, the people went further, and the momentous result was that on March 30, 1870, by a similar proclamation, the Secretary of State announced the ratification, by a like proportion of the States, of the fifteenth amendment to the Constitution, which is as follows:

"Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States, nor by any State, on account of race, color, or previous condition of servitude.

"Section 2. The Congress shall have power to enforce this article by appropriate legislation."

It will be observed that the prohibition of this amendment extends equally to the denial and to any abridgment of the right to vote on account of race, color, etc. It must be admitted that this amend-
16 ment is, and was intended to be, the great charter of the negro's right to vote. It is the fountain source from whence alone it sprung and which alone gave it vitality in many of the States. In the exercise of the powers given by these two amendments Congress passed several acts which were deemed by it appropriate; but in the cases before us we are concerned only with the provisions of the act entitled "An act to enforce the rights of citizens of the United States to vote in certain States of this Union, and for other purposes," approved May 31, 1870 (16 Stat., 140), commonly called the "enforcement act," as those provisions now appear in the Revised Statutes. Certain sections of this celebrated enactment have been passed upon by the Supreme Court. Some of them have been repealed, and some of them, though changed in form, are now sections 2004, 5507, 5508, and 5509 of the Revised Statutes. No one of these has ever been repealed or further modified. They still remain parts of the body of the laws of the United States, and are in full vigor, unless they be such enactments as are not authorized by any grant to the Congress of power to pass them.

It is contended for the accused that Congress has no power, under the Constitution, to impose penalties upon acts done at an election held for State officers only, by which is meant an election for officers of the State, as distinguished from Presidential electors and Representatives in Congress; and it is urged that this court has no jurisdiction in the cases before

us because it plainly appears from the indictment that, in that sense, the offenses charged were all committed at an election at which only State officers were chosen. It seems to the court that this argument proceeds upon a misapprehension alike of the statutes themselves and of the charge made against the accused. They are charged with violating the laws of the United States and not those of the State. These laws of the United States are not intended to deal with elections at all, in any direct or proper sense, either to regulate, control, or protect them. What the statutes which are to be construed and applied in these cases are designed to accomplish is, first, by section 5507, to prevent the denial or the abridgment of the right to vote of certain citizens (that is to say, the hindering, controlling, or preventing the exercise of the right
17 of suffrage, by means of bribery or intimidation, on account of race, color, or previous condition of servitude), and, second, by section 5508, to punish every conspiracy to intimidate certain persons in the exercise of the right to vote on account of race, color, etc. These statutes relate, not to the election per se, but to the denial or abridgment of the right of suffrage, as it is secured by the laws of the United States, by certain means, namely, by bribery, intimidation, etc., for certain reasons, namely, on account of race, color, etc., and for conspiracies designed to defeat that right. Article I, sec. 4, of the Constitution gives Congress power to enact laws regulating the time, place, and manner of electing Representatives in Congress; and legislation may be based upon that section, in which event, of course, a statute having that purpose alone in view could only be applied when Representatives were elected. But Congress, under the fifteenth amendment, may also legislate to enforce and protect the rights given by that amendment, in which event the legislation may apply to any occasion when the act is committed by which the right to vote is denied or abridged on account of race, color, or previous condition of servitude. Overlooking this distinction will lead to some confusion in endeavoring to apply the decisions of the courts. The idea would at least be novel that the fifteenth amendment applied only to Congressional elections.

While, as we have shown, Congress may, under Article I, section 4, pass laws to regulate the election of Representatives in Congress, still to limit the right of Congress to that power would require a new reading of another very plainly expressed constitutional provision. The fifteenth amendment, within the scope of its purpose, is as wide as the right to vote itself. It expressly and unequivocally prohibits the denial or the abridgment of the right to vote at any election whatever—national, State, or municipal—on account of race, color, or previous condition of servitude. Its terms are general, and it is as admissible to exclude all elections from its operation as it is to exclude any. Within the limitations specified it applies to the elective franchise, the right to vote, whenever, wherever, and however exercised by the people. It is apparent and undeniable that the nation itself determined to take care that no such discrimina-
18 tion as that provided against should be made, and it not only adopted the amendment to prohibit it, but authorized the Congress to enforce the prohibition by appropriate legislation. The power of Congress under a less liberal but somewhat similar provision was clearly, and we may say finally, fixed by the Supreme Court of the United States

when it approved the words of the great Chief Justice in the case of McCulloch v. Maryland (4 Wheat., 316; 4 L. Ed., 579), presently to be noticed. As we have seen, part of this legislation remains upon the statute books. It has been there 30 years unrepealed. It has a beneficial purpose behind it, namely, the enforcement of a provision of the organic law; and the court of first instance would not be inclined to hold it invalid, does not have any predisposition to do so, and should not in any event do it, except under a strong persuasion that it certainly violated the Constitution. Indeed, it may be admissible to apprehend that if this legislation is swept away by judicial action, the entire fabric so carefully builded upon the fifteenth amendment may disappear. However, the question should be most carefully examined, because of its great importance, not only to the public generally, but to the defendants particularly. For that reason we have bestowed upon it the most painstaking consideration. We have already noticed generally the language of the statutes under which these indictments were found, and have pointed out the intention thereby at least to attempt to guard the rights of a certain class of citizens to vote without being discriminated against on account of race, color, etc., and have to some extent animadverted upon the importance of guarding the right of suffrage, and the free exercise thereof by all who are entitled to vote; and we may add that none of the provisions of any of the statutes referred to in any possible way interfere with or abridge the right of any citizen to vote as he pleases. The purpose, probably the most obvious purpose, of the legislation is to safeguard the right of citizens to the extent authorized by the fifteenth amendment. In doing this it interferes with the rights of none. It simply punishes those who unlawfully interfere with the rights of others. As we have indicated, this is, to say the least, a laudable design. The evident intention being to enforce and preserve the rights given
19 by the fifteenth amendment, it still remains to be seen whether Congress has exercised its acknowledged power in a constitutional and effective manner. The courts have had other portions of the act under consideration upon several notable occasions, the most conspicuous instances of which we will notice in somewhat chronological order:

The case of U. S. v. Cruikshank, reported in 25 Fed. Cas., 707, 1 Woods, 308, was decided by Mr. Justice Bradley, sitting in the circuit court. Much of what he said in his very strong opinion is instructive, but, as the case turned upon sections now not on the statute books, it is not so much in point as it would otherwise have been. That case, so far as it has any relevancy to these, was based upon section 4 of the act (later found in a greatly changed form in section 5506 of the Revised Statutes) and which has been repealed. Speaking generally, the learned justice said, at page 713, 25 Fed. Cas., and page 324, 1 Woods:

"I am inclined to the opinion that Congress has the power to secure that right, not only as against the unfriendly operation of State laws, but against outrage, violence, and combinations on the part of individuals irrespective of State laws. Such was the opinion of Congress itself in passing the law at a time when many of its members were the same who had consulted upon the original form of the amendment in proposing it to the States. And as such a construction of the amendment is admissible and the question is one at least of grave doubt, it would be assuming a

great deal for the court to decide the law, to the extent indicated, to be unconstitutional."

This part of the opinion will be found very important further along.

On page 715, 25 Fed. Cas., and page 329, 1 Woods, the justice also said:

"The sixth count charges a conspiracy to prevent and hinder certain citizens of the United States, who were of African descent and persons of color, in the exercise and enjoyment of their right to vote at any election to be thereafter held in the State of Louisiana, or in the parish of Grant, knowing they had such right to vote. A conspiracy to hinder a person from exercising his right to vote at any election is made indictable by the fourth section of the enforcement act; also by the sixth section read in connection with the first. Over the general subject of the right to vote in the States, and the regulation of said right, Congress, as we have seen, has no power to legislate. The fifteenth amendment relates only to discriminations on account of race, color, and previous condition of servitude, and, as we have before shown, is a prohibition against the making of such discriminations. The law on which this count is founded is not confined to cases of discrimination above referred to. It is general and universal in its application. Such a law is not supported by the Constitution. The charge contained in the count does not describe a criminal offense known to any valid and constitutional laws of the United States. It should at least have been shown that the conspiracy was entered into to deprive the injured persons of their right to vote by reason of their race, color, or previous condition of servitude. This count I also regard as invalid."

It will be seen that the court held that the sixth count in the indictment, which, in general terms, charged a conspiracy to hinder certain citizens of African descent, and who were in fact persons of color, in exercising the right to vote at any election in Louisiana thereafter to be held, but which failed to show that the conspiracy was entered into to deprive the injured persons of the right to vote on account of their race or color or previous condition of servitude was not good; so that, however wide the range of the court's observations, the real question decided was that the sixth count was insufficient in law for that reason. On a writ of error the case was taken before the Supreme Court, where the judgment was affirmed. From the report of the case in 92 U. S., 543; 23 L. Ed., 588, we get a somewhat clearer idea of the language of the sixth count. In passing upon it the court left no doubt about its position at that time, whether the Yarbrough and later cases indicated modifications or not. At pages 555, 556, 92 U. S., and page 592, 23 L. Ed., we find this language:

"In U. S. v. Reese, 92 U. S., 214; 23 L. Ed., 563, we hold that the fifteenth amendment has invested the citizens of the United States with a new constitutional right, which is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship, but that exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the States comes from the States, but the right of exemption from the prohibited discrimination

comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been."

And on page 557, 92 U. S., and page 593, 23 L. Ed., the court continues:

"According to the view we take of these counts, the question is not whether it is enough, in general, to describe a statutory offense in the language of the statute, but whether the offense has here been described at all. The statute provides for the punishment of those who conspire 'to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States.' These counts in the indictment charge, in substance, that the intent in this case was to hinder and prevent these citizens in the free exercise and enjoyment of 'every, each, all, and singular' the rights granted them by the Constitution, etc. There is no specification of any particular right. The language is broad enough to cover all."

It is important to bear in mind, first, that there was no charge that the acts done were done on account of the race, color, or previous condition of the injured persons, and, second, that what the court was then speaking about was not section 5 of the enforcement act, nor section 5507 of the Revised Statutes, which took its place.

At the same term at which the Cruikshank case was decided, the court had previously passed its judgment upon the case of U. S. v. Reese, 92 U. S., 214; 23 L. Ed., 563. In that case the indictment was likewise based upon the third and fourth sections of the enforcement act, and not upon the fifth, which is now invoked by the United States. The fourth section, as originally enacted, as already shown, was commuted,
22 with most important modifications, into section 5506 of the Revised Statutes, which was repealed by the act of February 8, 1894 (28 Stat., 36), when the sections now under consideration were not touched. Under then existing circumstances this was quite significant. The ground upon which section 4 was held in the Reese case to be ineffectual was (as is sufficiently shown in our extracts from the opinion in the Cruikshank case, where they were also stated, and in a quotation from the opinion in the Reese case, presently to be made) that it applied, in general terms, to all voters, instead of being confined to the colored man and his rights under the fifteenth amendment. For this reason, and because the court was thereby rendered unable to separate its constitutional application from its unconstitutional, the whole section was condemned. Up to this point the Supreme Court had never expressed itself upon what are now sections 2004, 5507, 5508, and 5509 of the Revised Statutes; but in U. S. v. Harris, 106 U. S., at page 637, 1 Sup. Ct., at page 607, and 27 L. Ed., at page 293, the court did incidentally allude to the subject of at least one of them and said:

"The right guaranteed by the fifteenth amendment is protected by other legislation of Congress, namely, by sections 4 and 5 of the act of May 31, 1870, c. 114, and now embodied in sections 5506, 5507, Rev. St."

A similar observation was made by Mr. Justice Woods in his opinion in the case of Le Grande v. U. S. (C. C.), 12 Fed., 579, in which case it

was held that section 5519, Rev. St., had no reference to rights guaranteed by the fifteenth amendment.

The weight of these remarks is not altogether destroyed by including in them the reference to section 5506, because the modifications of section 4 of the act of 1870, in the opinion of the court in the fourth circuit, in the case of the U. S. v. Munford (C. C.), 16 Fed., 223, relieved section 5506 from the objections taken to the fourth section in the Reese case, and at least brought the legislation within Article I, sec. 4, of the Constitution. See also the very interesting remarks of Judge Hughes in the case of U. S. v. Belvin (C. C.), 46 Fed., 382.

23 Coming now to a consideration of what has been determined respecting the sections involved upon these demurrers, we find it different. Section 5508 is in this language:

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise upon the highway, or on the premises of another with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be punished," etc.

In Ex Parte Yarborough, 110 U. S., 651; 4 Sup. Ct., 152; 28 L. Ed., 274, the constitutionality of this section was directly adjudicated, as was that of section 5520, which was afterwards repealed. Yarborough, having been convicted upon an indictment which charged him with violations of those sections, applied to the Supreme Court for a writ of habeas corpus upon the ground that those statutory provisions were unconstitutional. The writ was refused. In passing upon the question, the court, through Mr. Justice Miller, said:

"The fifteenth amendment of the Constitution, by its limitations on the power of the States in the exercise of their right to prescribe the qualifications of voters in their own elections, and by its limitation of the power of the United States over that subject, clearly shows that the right of suffrage was considered to be of supreme importance to the National Government, and was not intended to be left within the exclusive control of the States. . . . While it is quite true, as was said by this court in U. S. v. Reese, 92 U. S., 214; 23 L. Ed., 563, that this article gives no affirmative right to the colored man to vote, and is designed primarily to prevent discrimination against him whenever the right to vote may be granted to others, it is easy to see that under some circumstances it may operate as the immediate source of a right to vote. In all cases where the former slaveholding States had not removed from their constitutions the words 'white man' as a qualification for voting, this provision did, in effect, confer on him the right to vote, because, being paramount to the State law, and a part of the State law, it annulled
24 the dicsriminating word 'white' and thus left him in the enjoyment of the same right as white persons. And such would be the effect of any future constitutional provision of a State which should give the right of voting exclusively to white people, whether they be men or women." (Neal v. Delaware, 103 U. S., 370; 26 L. Ed., 567.) In such cases this fifteenth article of amendment does, proprio vigore, substantially confer on the negro the right to vote, and Congress has the power to protect and enforce that right.

"In the case of U. S. v. Reese, so much relied on by counsel, this court said in regard to the fifteenth amendment that 'it has invested the citizens of the United States with a new constitutional right, which is within the protecting power of Congress. That right is an exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude.' This new constitutional right was mainly designed for citizens of African descent. The principle, however, that the protection of the exercise of this right is within the power of Congress is as necessary to the right of other citizens to vote as to the colored citizen, and to the right to vote in general as to the right to be protected against discrimination. The exercise of the right in both instances is guaranteed by the Constitution, and should be kept free and pure by Congressional enactments whenever that is necessary. The reference to cases in this court in which the power of Congress under the first section of the fourteenth amendment has been held to relate alone to acts done under State authority can afford petitioners no aid in the present case; for while it may be true that acts which are mere invasions of private rights, which acts have no sanction in the statutes of a State, or which are not committed by anyone exercising its authority, are not within the scope of that amendment, it is quite a different matter when Congress undertakes to protect the citizen in the exercise of rights conferred by the Constitution of the United States, essential to the healthy organization of the Government itself."

And on page 667, 110 U. S.; page 160, 4 Sup. Ct., and page 279, 28 L. Ed., the court continues:

"If the recurrence of such acts as these prisoners stand convicted of are too common in one quarter of the country and give omen of danger from lawless violence, the free use of money in elections, arising from the vast growth of recent wealth in other quarters, presents equal cause for anxiety. If the Government of the United States has within its constitutional domain no authority to provide against these evils, if the very sources of power may be poisoned by corruption or controlled by violence and outrage without legal restraint, then, indeed, is the country in danger and its best powers, its highest purposes, the hopes which it inspires, and the love which enshrines it are at the mercy of the combinations of those who respect no right but brute force on the one hand, and unprincipled corruptionists on the other."

Again, in Logan *v.* U. S., 114 U. S., 263, 12 Sup. Ct., 617, 36 L. Ed., 429, the constitutionality of sections 5508 and 5509 was directly adjudicated. Mr. Justice Gray, after reviewing all the cases in stating the opinion of the court, and while distinguishing the facts of that case from others, on pages 293 and 294, 144 U. S., page 626, 12 Sup. Ct., and page 439, 36 L. Ed., said:

"The whole scope and effect of this series of decisions is that while certain fundamental rights, recognized and declared, but not granted or created, in some of the amendments to the Constitution are thereby guaranteed only against violation or abridgment by the United States or by the States, as the case may be, and can not, therefore, be affirmatively enforced by Congress against unlawful acts of individuals, yet that every right created by, arising under, or dependent upon the Con-

stitution of the United States may be protected and enforced by Congress by such means and in such manner as Congress, in the exercise of the correlative duty of protections, or of the legislative powers conferred upon it by the Constitution, may, in its discretion, deem most eligible and best adapted to attain the object. Among the particular rights which this court, as we have seen, has adjudged to be secured, expressly or by implication, by the Constitution and laws of the United States, and to be within section 5508 of the Revised Statutes, providing for the punishment of conspiracies by individuals to oppress or injure citizens in the free exercise and enjoyment of rights so secured, are the political
26 right of a voter to be protected from violence while exercising his right of suffrage under the laws of the United States, and the private right of a citizen, having made a homestead entry, to be protected from interference while remaining in the possession of the land for the time of occupancy which Congress has enacted shall entitle him to a patent."

The section was also held constitutional in the case of In re Quarles, 158 U. S., 535, 15 Sup. Ct., 959, 39 L. Ed., 1080.

But these cases do not quite reach the exact point under consideration, however clearly they establish the general proposition that section 5508 is constitutional. It becomes necessary, therefore, to go further. In doing so we find that the able statesmen in Congress who were endeavoring to legislate to carry into effect the fifteenth amendment framed, and Congress passed, what is now section 2004 of the Revised Statutes, as follows:

"All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude, any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding."

We think this is appropriate legislation, that it is within the constitutional power of Congress, that it is adapted to the end in view, and that it must be read in connection with section 5508.

It is urged with much zeal in respect to both indictments that the many adjudged cases which hold that the fourteenth amendment operates only as an inhibition upon the States and not individuals in respect to the matters therein embraced must control the construction of the fifteenth amendment also upon the same grounds. The court does not yield to this view, but accepts that of Justice Bradley, in passing upon the Cruikshank case at the circuit, in the language previously quoted. And in the Reese case, 92 U. S., 218, 23 L. Ed., 565, the court, after saying that Article I, sec. 4, was not under consideration, used this significant language:

27 "It has not been contended, nor can it be, that the amendment confers authority to impose penalties for every wrongful refusal to receive the vote of a qualified elector at State elections. It is only when the wrongful refusal at such an election is because of race, color, or previous condition of servitude that Congress can interfere and

provide for its punishment. If, therefore, the third and fourth sections of the act are beyond that limit, they are unauthorized."

These considerations appear to us to be decisive of the demurrer in that one of the cases now before us in which the indictment is based upon section 5508. Indeed, as it cannot be doubted that the right of the colored man to vote is "secured" by the Constitution of the United States, in the sense of that word as used in that section, and especially when it is construed in connection with section 2004, the question is no longer open to argument. If that right is not "secured" in that way, it rests upon no security whatever.

We now come to section 5507, upon which the other indictment is based, and which is in this language:

"Every person who prevents, hinders, controls, or intimidates another from exercising or in exercising the right of suffrage, to whom that right is guaranteed by the fifteenth amendment to the Constitution of the United States, by means of bribery, or threats of depriving such person of employment or occupation or of ejecting such person from a rented house, lands, or other property, or by threats of refusing to renew leases or contracts for labor, or by threats of violence to himself or family, shall be punished as provided in the preceding section."

Is this "appropriate" legislation, and within the power of Congress, under section 2 of the fifteenth amendment? We think a test has been established for our guidance in reaching a conclusion upon that question. The Constitution had granted Congress power to pass all laws "necessary and proper" to carry into effect the other powers given by that instrument. It will be admitted that the words "necessary and proper" are stronger than the word "appropriate," as used in the section just referred to. Yet Chief Justice Marshall said:

28 "We admit, as all must admit, that the powers of the Government are limited and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the National Legislature that discretion with respect to the means by which the powers it confers are to be carried into execution which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are prohibited, but consist with the letter and spirit of the Constitution, are constitutional." McCulloch v. Maryland, 4 Wheat., 421, 4 L. Ed., 605.

Tested by this rule, we are now to determine whether Congress had the constitutional power to enact this particular legislation which it deemed appropriate to enforce the amendment. Of course it cannot be said that the decision of Congress in the premises is necessarily final, and for that reason, I have endeavored to find the test by which the matter was to be judged. If it is not found in 4 Wheat., 4 L. Ed., and in the cases which follow that authority, and which are collected in I Notes on U. S. Reports, 872 et seq., it cannot be found at all. We are clearly of opinion that the rule is applicable to this case and that it must be followed. The plain and manifest intention of Congress, as avowed and expressed in sections 2004 and 5507 was to prevent, by the means therein indicated, any abridgement of the free exercise of the right to vote guaranteed by

the fifteenth amendment by means of bribery, threats, or intimidation. That was the sole intention. There was no other. The end was legitimate. The purpose was within the scope of the fifteenth amendment. The means are plainly adapted to that end, and are not prohibited, but consist with the letter and spirit of that amendment.

Possibly we may get additional light upon the question by going back somewhat and viewing it from another standpoint. Section 4 of the act of 1870, and which was considered in the Reese case, is as follows:

"That if any person, by force, bribery, threats, intimidation, or other unlawful means, shall hinder, delay, prevent, or obstruct, or shall
29 combine and confederate with others to hinder, delay, prevent, or obstruct any citizen from doing any act required to be done to qualify him to vote or from voting at any election as aforesaid, such person shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action on the case with full costs, and such allowances for counsel fees as the court shall deem just, and shall also for every such offense be guilty of a misdemeanor, and shall on conviction thereof be fined," etc.

In direct reference to this language, the Supreme Court said (92 U. S., 220, 221; 23 L. Ed., 565, 566):

"But when we go beyond the third section, and read the fourth, we find there no words of limitation or reference, even, that can be construed as manifesting any intention to confine its provisions to the terms of the fifteenth amendment. That section has for its object the punishment of all persons who, by force, bribery, etc., hinder, delay, etc., any person from qualifying or voting. In view of all these facts, we feel compelled to say that, in our opinion, the language of the third and fourth sections does not confine their operation to unlawful discrimination on account of race, etc. If Congress had the power to provide generally for the punishment of those who unlawfuliy interfere to prevent the exercise of the elective franchise, without regard to such discrimination, the language of these sections would be broad enough for that purpose. It remains now to consider whether a statute so general as this in its provisions can be made available for the punishment of those who may be guilty of unlawful discrimination against citizens of the United States, while exercising the elective franchise, on account of their race, etc. There is no attempt in the sections now under consideration to provide specifically for such an offense. If the case is provided for at all, it is because it becomes under the general prohibition against any wrongful act or unlawful obstruction in this particular. We are therefore directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wron'ful acts, without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which
30 Congress may rightfully prohibit and punish. For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must

stand as a whole, or fall altogether. The language is plain. There is no room for construction unless it be as to the effect of the Constitution. The question then to be determined is whether we can introduce words of limitation into a penal statute, so as to make it specific, when, as expressed, it is general only. It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the Government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere Congress is supreme and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the courts are authorized to and when called upon in due course of legal proceedings, must annul its encroachments upon the reserved power of the States and the people. To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty. We must therefore decide that Congress has not as yet provided 'appropriate legislation' for the punishment of the offense charged in the indictment."

That is to say, Congress has not provided for that case. It was, however, by no means intended to be said that Congress had not provided for the punishment of the very different offense charged in the indictment we are now considering.

When we turn from this section to section 5507, Rev. St., we find that it is not framed in such general terms as to include as well offenses which may be constitutionally provided against as those which may not—
the only vice which led to the condemnation of section 4 of the
31 act of 1870. On the contrary, section 5507 is so phrased that by no possibility could anyone be punished except for doing such an act as would deny or abridge the right of a colored man to vote freely as he pleased. The reason this is so is that this section is expressly limited to those to whom that right is guaranteed by the fifteenth amendment. The language of this section admits of no construction that would punish the obstructing of a white man's vote, except on the ground of race or color, in which event (though in fact it is inconceivable in our social condition) he would be as much entitled to the benefit of the fifteenth amendment as the negro is now. At all events, the whole scope of section 5507 appears plainly to be within the intent of the fifteenth amendment, and to have the purpose to make section 2004 affective. There is therefore no occasion for an attempt as there was in reference to section 4, to separate what was within the power of Congress from what was not. The effort would be vain, inasmuch as the object was single. This conclusion is inevitable when we compare the two sections in the light of what is said in 92 U. S. at page 221, and 23 L. Ed. at page 566, as copied above; and this may further indicate why the reasoning of the Yarb'rough case, and not that in the Reese case controls those we are now considering.

Undoubtedly the general right to vote existed long before the adoption of the fifteenth amendment, because it sprung up in the remote past with the genesis of free government by the people, but, so far as the colored

man is concerned, the right not only originated, but is "guaranteed" by that amendment, as that word is used in section 5507; that is to say, that amendment guarantees that that right shall not be denied or abridged on account of race, color, or previous condition of servitude. This section of the statute was intended to enforce and protect that right by appropriate legislation which may extend to punishing those who seek to deny or abridge it upon those grounds. Ex parte Yarborough 110 U. S., 657; 4 Sup. Ct., 152; 28 L. Ed., 264. Section 4 and other sections were held to be unconstitutional, because they referred to the right of everybody to vote and were not confined to the right as guaranteed by the fifteenth amendment. The court held that Congress did not have power to legislate so generally upon the subject of
32 voters and their rights. Neither the reasoning nor the decisions apply, however, to cases where, by the express provisions of the statute, the legislation is limited to cases of persons whose violated rights are guaranteed by that amendment. Sections 2004 and 5507 are so limited, and they supplement one another. Indeed, it is difficult in Kentucky to conceive that the right of suffrage was not directly conferred upon the colored man by the fifteenth amendment, notwithstanding the statement to the contrary in the Reese case. The difficulty, moreover, is increased when we read the language used by Mr. Justice Harlan in delivering the opinion of the court in Neal v. Delaware, 103 U. S., 388, 389; 26 L. Ed., 567, and especially when we recur to the remark of Mr. Justice Miller in the Yarborough case, 110 U. S., 665; 4 Sup. Ct., 159; 28 L. Ed., 278, where, in speaking of States in whose constitutions the word "white" remained, he said:

"In such cases this fifteenth article of amendment does, proprio vigore, substantially confer on the negro the right to vote, and Congress has the power to protect and enforce that right."

It is incontrovertibly true that at all times prior to September, 1891, and to the constitution then adopted, the negro was excluded by our State laws from the right to vote. From 1850 to September, 1891, the word "white" remained in that provision of the State constitution which fixed the qualifications of voters. Yet so certainly did the fifteenth amendment confer the right of suffrage upon the negro that in Kentucky from March, 1870, forward he voted precisely as the white man did in spite of the State constitution. To say the very least, the nation indirectly conferred upon the negro the right to vote by directly and expressly forbidding that that right should be denied or abridged on account of race, color, or previous condition of servitude, and it gave Congress the power to protect and guard the right thus bestowed. Congress plainly exercised that power by the legislation referred to. This was not grudgingly done by the American people or by Congress. It was done as a matter of supreme national concern and to meet what were decided to be the ends of national justice. The courts are not called upon, in the interest of wrongdoing, to fritter away by narrow or frivolous construction the safeguards of this great right so carefully bestowed. That Congress, in enacting remedial criminal legislation, is not hampered by the
33 narrow limitations contended for is shown by what is so admirably expressed by Mr. Justice Miller in the Yarborough case, where, on pages 657, 658, 110 U. S., page 155, 4 Sup. Ct., and page 276, 28 L. Ed., he says:

"That a government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration. If this Government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the General Government, it must have the power to protect the elections on which its existence depends from violence and corruption. If it has not this power, it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption. The proposition that it has no such power is supported by the old argument, often heard, often repeated, and in this court never assented to, that, when a question of the power of Congress arises, the advocate of the power must be able to place his finger on words which expressly grant it. The brief of counsel before us, though directed to the authority of that body to pass criminal laws, uses the same language. Because there is no express power to provide for preventing violence exercised on the voter as a means of controlling his vote, no such law can be enacted. It destroys at one blow, in construing the Constitution of the United States, the doctrine universally applied to all instruments in writing—that what is implied is as much a part of the instrument as what is expressed. This principle, in its application to the Constitution of the United States, more than to almost any other writing, is a necessity, by reason of the inherent inability to put into words all derivative powers—a difficulty which the instrument itself recognizes by conferring on Congress the authority to pass all laws necessary and proper to carry into execution the powers expressly granted, and all other powers vested in the Government, or any branch of it, by the Constitu-
34 tion. Article I, sec. 8, cl. 18. We know of no express authority to pass laws to punish theft or burglary of the Treasury of the United States. Is there, therefore, no power in the Congress to protect the Treasury by punishing such theft and burglary? Are the mails of the United States and the money carried in them to be left to the mercy of robbers and of thieves who may handle the mail, because the Constitution contains no express words of power in Congress to enact laws for the punishment of those offenses? The principle, if sound, would abolish the entire criminal jurisdiction of the courts of the United States, and the laws which confer that jurisdiction."

This demonstrates that it was in no way essential to use the words "race, color, or previous condition of servitude" in order to make section 5507 constitutional. It being obvious from the language actually employed that Congress thereby meant to enforce the fifteenth amendment, the only question was, is the plan provided by this section an appropriate way to accomplish the result? That it is, at least, adapted to that end, seems clear. All that is required is that the legislation shall come within the scope of the power to enforce the amendment. It is not essential that the language of the statute shall be the same as that of the amendment. For example the statutes of the United States make the act of robbing the mails a criminal offense. There is not a word in

the Constitution about such an offense. But that instrument does give Congress the power to establish post-offices and post-roads, and it does authorize Congress to pass all laws necessary and proper to carry that power into effect. Punishment for robbing the mails is indispensable to that end. But an indictment need not, in its averments, reason this out. The courts do that. U. S. vs. Ajona, 120 U. S. 488, 7 Sup. Ct., 628, 30 L. Ed., 728. Other cases illustrative of this may be found in I Notes on U. S. Reports, 872 et seq. In attempting to enforce and protect the colored man's right to vote, it is obvious that Congress was utterly powerless to pass any law that could operate upon States as such. It could only enforce the rights of voters as given by the fifteenth amendment by punishing individuals who attempt to invade, impair, or destroy it. U. S. v. Reese, 92 U. S., 218; 23 L. Ed., 563, and U. S. v.
35 Cruikshank, 25 Fed. Cas., 713. If Congress could not do this, if section 2 of the amendment does not authorize this, then that section was a vain thing, for in no other general manner could Congress appropriately legislate to that end. We adopt the language of Mr. Justice Bradley on this subject, in the Cruikshank case, first quoted above, as being incontrovertibly sound. The legislation in question was designed and intended to protect the right given by the amendment, by prescribing punishments for attempts upon the part of individual persons to deny or to abridge the right to vote as guaranteed by a constitutional amendment, which forbade any abridgement. The purpose of the statute being such, and it being thus limited in scope, the question of its mere wisdom or efficiency was exclusively within the discretion and judgment of Congress, as decided in McCulloch v. Maryland and many succeeding cases, and there appears to be nothing in Williams v. Mississippi, 170 U. S., 213, 18 Sup. Ct., 583, which has any contrary bearing.

It is insisted, also, upon the part of the defendants, that the offenses actually charged in the indictments are not embraced by any proper construction of the statutes, because, first, the right alleged to have been injured was not one which was "secured" by any law of the United States; and, second, because the things done and which are charged to be offenses did not touch any right or interest of the United States, but only those of the State of Kentucky, and hence no crime was committed. A critical inspection of the statutes and of the indictments leads to the conclusion that these objections, while plausible, are not sound. Neither the fifteenth amendment, nor the statute to enforce it, was intended, in any primary sense, to protect any interest of the United States. The great direct and fundamental object was to secure for the colored man an equal participation with the white man in the inestimable individual and personal privilege of voting and having a voice in the affairs of government, and what we have already said sufficiently indicates that our view is that the right of the colored man to vote is "secured" to him by the laws of the United States, within the sense of that word as used
36 in section 5508. This is done by the amendment and by section 2004, Rev. St., passed to enforce it. The court has by no means overlooked the opinion of Judge Gresham in the case of U. S. vs. Amsden (D. C.), 6 Fed., 819, which held section 5507 to be unconstitutional. That case is not followed because, in our judgment, it does not appear to have been ruled according to the views of the Supreme Court, either in the

Yarborough case or in the Rese case. Indeed, if the views of that learned judge, as there expressed, are to prevail, the fifteenth amendment is far less important, and far less adapted to the objects its framers had in view than might have been inferred from the tremendous struggle for its adoption, and the matter had probably as well have been left with the States altogether. Opposed to what he said, it seems to us that the phrase, "to whom the right of suffage is guaranteed by the fifteenth amendment" as used in section 5507, when properly construed does the very thing which he thought it did not, and in the light, especially of the Yarborough case, if not, indeed, of the Reese case itself, entirely exempts that section from the criticism passed upon section 4 of the enforcement act by the court in the Reese case. Differing from Judge Gresham, we can not doubt that the use of the words, "to whom the right of suffrage is guaranteed by the fifteenth amendment" in section 5507, shows conclusively that the sole intention of congress was to enforce and protect the rights of the colored man to vote, and clearly limits the legislation to that legitimate and constitutional end. In short, it seems to us that the general conclusions to be drawn from the authorities are (1) that the fifteenth amendment was meant to guarantee and secure to the negro, as such, the same right to vote that the white man, as such, has; (2) that Congress has the power by legislation to enforce and protect that right; (3) that any legislation having that sole object in view, if adapted to that end, if consistent with that object, and not otherwise forbidden by the Constitution, is within the power of Congress; and (4) that section 5507 comes within these principles, and is a valid exercise of the power of that body.

The right of the colored man to vote had its only source in, and is most certainly in, the language of Justice Gray in the Logan case, 144 U. S., 263, 12 Sup. Ct., 617, 36 L. Ed., 429, "dependent upon" the fifteenth amendment, which, beyond doubt, not only created that
37 right for him, but which at the same time gave to Congress the power, and, morally at least, imposed upon it the duty to enforce and protect it by legislation. Sections 2004, 5507, 5508, and 5509 may not, by any means, be entirely adequate for the purpose, but they are all that is left, and should not be hastily swept away by the courts. The three sections, at least, which are now before us for consideration appear to be appropriate and valid. The Supreme Court in several cases, as we have seen, having refused upon the clearest principles to declare section 5508 unconstitutional, we are not only bound by that ruling, but must decline to hold that section 5507 is void, because it seems to the court that there are, if possible, even less grounds for so holding that there might be as to section 5508. It will be observed that section 5507 fixes the penalties for the offenses therein created by providing that they shall be the same as those "prescribed in the preceding section." As section 5506 was repealed by the act of 1894, it is contended that there is no punishment left for the offenses named in section 5507, thereby leaving the section ineffectual. It must be seen, however, that the real intention of Congress in the act of 1894 was twofold, viz, (1) to repeal section 5506, and (2) not to repeal section 5507. But the contention of counsel, if sustained, must lead to a result plainly different from that evidently contemplated by Congress, to wit, the repeal of one and the emasculation of the other. The difficulty can be easily removed upon a

just principle of construction which will effectuate both of the objects Congress had in view, by holding that the repeal of section 5506 in nowise obliterated the record of the language used in prescribing the penalties for offenses which were no longer to be such, but left it still known and ascertainable, and in full effect, so far as it was by reference made a part of section 5507 and necessary for its construction and effectiveness. As to the mere penalties prescribed, section 5506 is, and always was, a part of section 5507, and to that extent and for that purpose is not repealed. The indictment under section 5508 charges that on November 7, 1899, a general election for State officers within the State of Kentucky was held under and in accordance with the laws of said State, and a poll was then and there opened, and an election was then and there
38 legally had and held, in each voting precinct in said State, in each of which said voting precincts persons were then and there lawfully voted for by the legal voters therein for said State officers, and that at a certain named precinct certain named persons and divers other parties to the grand jurors aforesaid unknown, were then and there, as the defendants well knew, colored men, negroes, men of African descent, and not white men, male citizens of the United States, and as the defendants well knew, citizens and residents of said voting precinct, 21 years of age, and had been citizens and residents of said precinct for more than 60 days, and of said county in which said precinct is located for more than 6 months, and of the said State for more than 1 year next preceding said election, and were then and there, as defendants well knew, under the laws of the United States and the laws of the State of Kentucky, legally entitled to vote for persons for said State offices; that said voters at the time and place aforesaid presented themselves with the intention and for the purpose of voting, and demanded of the officers of said precinct permission to vote; that the defendants, knowing all of the aforesaid facts, did then and there unlawfully, knowingly, and feloniously conspire, confederate, combine, and agree together and each of them with the other, and they and each of them with divers other parties to the grand jurors aforesaid unknown, to injure, oppress, threaten, and intimidate said voters, on account of their race, color, and previous condition of servitude, in the free exercise and enjoyment of a right and privilege which they then and there had, and which was then and there secured to them by the Constitution and laws of the United States, of then and there voting for persons to fill offices at said precinct, and that in pursuance of said conspiracy, and to effect the purpose and object thereof, the defendants then and there unlawfully, willfully, corruptly, and maliciously injured, oppressed, threatened, intimidated, and prevented the said voters from voting in said precinct on said election day. It is contended that this is not good, because it does not charge in terms that the right injured is "the right not to be discriminated against on account of race," etc. That language, however, is the language of the courts, and not that used either in the amendment or in sections 2004 or 5508, a fact which the contention overlooks. If such discrimination be in sub-
39 stance and effect charged, as we think is the case here, it is sufficient, although that word is not used in making the accusation. Construing the constitutional and statutory provisions together, the indictment seems to be good, and to charge that the accused conspired to injure certain colored men in the exercise of the right to vote,

who were otherwise legally qualified to do so, on account of their race and color—they having that right in the sense that it is "secured" to them by the amendment and section referred to—which conspiracy is an offense against the United States, for which section 5508 fixes the penalty.

Only one thing remains to be noticed. It is urged against the indictment, under section 5507, that the offense charged is mere bribery at a State election, and that the State courts alone have jurisdiction. This contention does not seem to be very material, because, while doubtless the State could also punish such an offense, it by no m'ans follows that the National Government may not do it also in proper cases. There are many instances where the same acts and offenses against the laws both of the State and of the United States, probably the most conspicuous example of which is the offense of passing counterfeit money. Bribery at an election may be made an offense by the State, and if that were all that had been done, this court could not enforce the law. But in at'empting to enforce the fifteenth amendment and to prevent the abridgement of the right to vote on account of race or color, Congress has made it an offense against the United States to influence or control the vote of a colored man by means of bribery. Of this offense thus created, and as charged in the indictment, the Federal courts alone have jurisdiction. For these reasons it seems to the court that the demurrers and motions to quash should be overruled.

40 The views thus expressed were by no means lightly formed, and I can not rid myself of the conviction that they are correct, and that section 5507 is appropriate legislation to enforce the 15th amendment to the Constitution. However, upon a writ of error to the circuit court of appeals that court took a radically different view of the question, and reversed the judgment I had rendered. The opinion of that court will be found in the case of Lackey v. United States, 107 Fed. Rep., 114.

Some suggestion has been made that the indictment in the Lackey case had reference to a mere State election, and that a different rule might apply here where the election was for a Representative in Congress, but I am clearly of the opinion that such a distinction is wholly unfounded, and that the operation of the 15th amendment is not limited to Congressional elections, but obviously extends to all elections where the elective franchise is exercised in public affairs. And, further, it seems to me that one of the most effective ways to "control" or "hinder" the free exercise of that right is "by means of bribery," which section 5507 is designed to prevent.

It is therefore not now a question of whether I am convinced of the accuracy of the judgment of the circuit court of appeals, because whether so or not, I must follow it. It is my duty, as I interpret it, to follow that opinion, and in doing so I am led to the result that the petitioner must be discharged, and an order to that effect will accordingly be entered.

Nov. 16, 1901.

WALTER EVANS, *Judge.*

41 And on the 23rd day of November, 1901, came the respondent, A. D. James, United States marshal for the western district of

Kentucky, and the United States of America, by R. D. Hill, United States attorney, and filed a petition for an appeal herein, together with an assignment of errors, and thereupon, on 'heir motion, it is ordered that an appeal be allowed herein to the United States Supreme Court.

The petition for appeal and assignment of errors above referred to are as follows:

42 District court of the United States for the western district of Kentucky.

In the matter of Henry Bowman.

PETITION FOR APPEAL

To the Honorable Walter Evans, judge of the above-named court, presiding therein.

The respondent, A. D. James, United States marshal for the western district of Kentucky, feeling himself aggrieved, and the United States of America, feeling themselves aggrieved by the judgment, decision, and decree made and entered by the above-named court in the above-entitled matter under date of November 16th, 1901, wherein and whereby it was considered, adjudged, and decreed that the imprisonment and detention of the relator, Henry Bowman, by the respondent, A. D. James, United States marshal for the western district of Kentucky, as aforesaid, was in violation of the Constitution and laws of the United States, and that he, the said Henry Bowman, be discharged and go hence without day, hereby pray an appeal to the Supreme Court of the United States from said judgment, decision, and decree for the reasons set forth in the assignment of errors which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said decision and judgment was made, duly authenticated, may be sent to the Supreme Court of the United States.

R. D. Hill,
United States Attorney for the Western District of Kentucky,
Attorney for the Respondent and the U. S.

November 22nd, 1901.

The foregoing claim of appeal is allowed.

Walter Evans,
United States District Judge for the Western District of Kentucky.

November 23, 1901.

43 The assignment of errors above referred to is as follows:

District court of the United States for the western district of Kentucky.

In the matter of Henry Bowman.

ASSIGNMENT OF ERRORS.

And now, on the 22nd day of November, 1901, comes the said A. D. James, United States marshal for the western district of Kentucky, by

R. D. Hill, United States district attorney for the western district of Kentucky, his solicitor, came also the United States by said Hill, U. S. Atty., as aforesaid, and say that the decree in the said case is erroneous and against the just rights of the said A. D. James and the United States, for the following reasons:

1st. Because the court erred in holding, decreeing, and adjudging that the said Henry Bowman was in the custody of the respondent, A. D. James, United States marshal for the western district of Kentucky, in violation of the Constitution and laws of the United States, and in discharging the said prisoner from the custody of said respondent, A. D. James, United States marshal as aforesaid.

2nd. Because the said decree, decision, and judgment of the court is contrary to law and the Constitution of the United States.

3rd. Because the court erred in holding, decreeing, and adjudging that section 5507 of the Revised Statutes of the United States was and is in violation of the Constitution of the United States and therefore void, and on that account the imprisonment and detention of the said Henry Bowman by respondent, A. D. James, United States marshal as aforesaid, was in violation of the Constitution and laws of the United States, and in discharging the said prisoner, Henry Bowman, from the custody of said A. D. James, marshal as aforesaid.

Wherefore respondent and appellant, A. D. James, marshal as aforesaid, and the United States pray that the decree, decision, and judgment be reversed, and that said district court be directed to enter all such decrees and judgments as may be necessary in the premises.

R. D. Hill,
United States Attorney for the Western District of Kentucky.
Attorney for Respondent and the United States.

44 Western District of Kentucky, *ss:*

I, Thomas Speed, clerk of the district court of the United States for the western district of Kentucky, at Louisville, do hereby certify that the foregoing 43 pages contain a true and correct transcript of the record and proceedings in the matter of Henry Bowman, ex parte, as the same appears from the files and records in my said office.

Witness my hand and seal of said court this 5th day of December, A. D. 1901.

[seal.]

Thos. Speed, *Clerk.*
By Henry F. Cassin, *D. C.*

45 United States of America, western district of Kentucky, sixth judicial circuit.

To Henry Bowman, greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court to be holden at the city of Washington, D. C., on the 21st day of December next, pursuant to an appeal granted by the district court of the United States for the western district of Kentucky, wherein A. D. James, United States marshal for the western district of Kentucky & the United States of America are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why

the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, this 23rd day of November, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States of America the one hundred and twenty-sixth.

[SEAL.] WALTER EVANS, *Judge.*

46 Service of the written citation accepted this 29th day of November, 1901.

WM. B. DIXON,
Attorney for Henry Bowman.

(Indorsement on cover:) File No., 18357. W. Kentucky D. C. U. S. Term No., 213. A. D. James, U. S. marshal for the the western district of Kentucky and the United States, appellants, vs. Henry Bowman. Filed, December 20, 1901.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

A. D. JAMES, UNITED STATES MARSHAL for the Western District of Kentucky, and the United States, appellants,
v.
HENRY BOWMAN.
No. 213.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from a judgment of the District Court of the United States for the Western District of Kentucky, discharging on *habeas corpus* the appellee, Bowman, from the custody of the appellant, James, United States marshal for that District.

Bowman, together with one Harry Weaver, was indicted in the District Court for a violation of section 5507 of the Revised Statutes of the United States, which provides:

> SEC. 5507. Every person who prevents, hinders, controls, or intimidates another from

> exercising, or in exercising the right of suffrage, to whom that right is guaranteed by the Fifteenth Amendment to the Constitution of the United States, by means of bribery or threats of depriving such person of employment or occupation, or of ejecting such person from a rented house, lands, or other property, or by threats of refusing to renew leases or contracts for labor, or by threats of violence to himself or family, shall be punished as provided in the preceding section.

The indictment charged that at an election for a Representative in Congress held in the Fifth Congressional District of Kentucky on November 8, 1898, certain persons therein named, and others whose names were unknown to the grand jury, "men of African descent, colored men, negroes, and not white men," citizens of the United States and of the State of Kentucky and legally qualified to vote under the laws of both, and "persons to whom the right of suffrage and the right to vote was then and there guaranteed by the Fifteenth Amendment," were prevented by the accused, by means of bribery, from exercising such right.

In default of bail, Bowman was committed to the custody of the marshal to await his trial. He thereupon applied to the District Court for a writ of *habeas corpus*, on the ground that section 5507 was in violation of the Constitution of the United States and void. Although entertaining no doubt of the constitutionality of the statute in its broadest aspects, the District Court felt constrained to accept the decision of the Circuit

Court of Appeals for the Sixth Circuit in *Lackey* v. *United States* (107 Fed. Rep., 114)—in which section 5507, as applied to bribery at State elections, had been declared unconstitutional—as conclusive of the question raised by the petitioner, and therefore ordered his discharge. From that judgment the marshal and the United States have appealed to this court.

ASSIGNMENTS OF ERROR.

1. The District Court erred in holding that said Henry Bowman was in the custody of the United States marshal in violation of the Constitution of the United States, and in discharging Bowman from the custody of the marshal.

2. The judgment of the District Court is contrary to law and the Constitution of the United States.

3. The District Court erred in holding that section 5507 of the Revised Statutes was and is in violation of the Constitution of the United States and therefore void, and on that account the imprisonment and detention of Bowman by the marshal was in violation of the Constitution and laws of the United States, and in discharging him from the custody of the marshal.

JURISDICTION.

An appeal lies direct to this court from the judgment of a District Court in a *habeas corpus* case where the constitutionality of a law of the United States is drawn in question, under section five of the Circuit Court of Appeals act. (26 Stats., 826.)

Rice v. *Ames* (180 U. S., 371, 373–4).
Cross v. *Burke* (146 U. S., 82, 88).

It is well settled that a writ of *habeas corpus* is a civil proceeding, even when instituted to arrest a criminal prosecution.

Ex parte Tom Tong (108 U. S., 556, 559).
Farnsworth v. *Montana* (129 U. S., 104, 113).

An appeal will therefore lie to review the order of the court discharging the petitioner.

Virginia v. *Paul* (148 U. S., 107, 123–124).

ARGUMENT.

I.

THE QUESTION INVOLVED.

The question presented by the facts of this case is the constitutionality of section 5507, Revised Statutes, *as applied to Congressional elections.*

In disposing of the case upon the authority of *Lackey* v. *United States*, the District Court said (Rec., 26):

> Some suggestion has been made that the indictment in the *Lackey* case had reference to a mere State election, and that a different rule might apply here, where the election was for a Representative in Congress, but I am clearly of opinion that such a distinction is wholly unfounded, and that the operation of the Fifteenth Amendment is not limited to Congressional elections, but obviously extends to all elections where the elective franchise is exercised in public affairs.

The District Court erred in thus confounding the authority of Congress in respect of these two very differ-

ent classes of elections. Undoubtedly, the Fifteenth Amendment was intended to apply to State as well as Federal elections; but it does not follow that legislation with respect to the one class is dependent upon its validity with respect to the other. The power of Congress over Federal elections is not derived primarily or entirely from the Fifteenth Amendment, which is said to be the exclusive source of its authority to interfere at State elections, but comes from other provisions of the Constitution. (*Ex parte Yarbrough*, 110 U. S., 651.) In the one case, the only question is whether an enactment of Congress is "appropriate legislation" to enforce the Fifteenth Amendment. If not, it is unconstitutional, so far as State elections are concerned. But its validity, as applied to Congressional elections, may be sustained upon other grounds. In *Lackey* v. *United States*, the Circuit Court of Appeals emphasized the fact that that case related to a "purely State election." For that reason, it was stated, the views expressed by this court in *Ex parte Yarbrough* did not apply, since all that was there said had reference to elections at which Congressmen were chosen.

In *United States* v. *Reese* (92 U. S., 214), section 4 of the Enforcement Act of May 31, 1870 (16 Stats., 140), afterwards reenacted as section 5506 of the Revised Statutes, and which provided for the punishment of any person who should, by force, bribery, threats, intimidation, or other unlawful means, hinder, delay, etc., or should combine with others to hinder, delay,

prevent, or obstruct any citizen from doing any act required to be done to qualify him to vote, or from voting at any election, was held to be unconstitutional. In that case, which related to offenses committed at a *State* election, the United States, as was expressly pointed out by the court, abandoned all claims except those arising out of the enforcement of the Fifteenth Amendment. The sole question, therefore, considered by the court was whether the statute in question was "appropriate legislation" to enforce that Amendment. The court held that it was not.

In *United States* v. *Munford* (16 Fed. Rep., 223) the constitutionality of section 5506, Revised Statutes, as applied to *Congressional* elections, was before the Circuit Court of the United States for the Eastern District of Virginia. Referring to the decision of this court in *United States* v. *Reese*, the Circuit Court said (pp. 228–9):

> The court in the *Reese* case decided that section 5506 was not appropriate legislation to enforce the Fifteenth Amendment. The section said nothing of race, color, and previous condition. It was at a municipal election, and therefore was not within the power of Congress under section 4, Article 1, of the Constitution, which gives power to Congress over Federal elections. *Had the same crime been committed at a Federal election* the court would, we think, have found the authority for section 5506 under the fourth section, Article 1, above recited.

In his concurring opinion in that case, Judge Hughes said (16 Fed. Rep., 229):

> We are dealing here with an offense charged to have been committed, in a Federal election, in violation of this section 5506; and the defense asks us to base our ruling, in this case of a Federal election, upon the ruling of the Supreme Court in a case arising in a town election under the act of 1870, in which that court not only carefully confined itself to the case before it, but protested by iteration that it was not considering any law in its relation to Federal elections. *Its opinion in Reese et al. was expressly confined to section 4 of the act of 1870 in its relation to State elections,* and the court held that section not to be within the purview of the Fifteenth Amendment of the Constitution. But, even as to that section, the court did not, and took especial pains not to, decide that the section was beyond the purview of the first Article of the Constitution. The Supreme Court has never decided that section 4 of the act of 1870 was unauthorized by Article 1. Much less has it ever decided that section 5506 of the Revised Statutes was unauthorized by Article 1. This Article and the Fifteenth Amendment are as follows; and it will be seen that the former refers only to Federal elections, while the latter refers to all elections, Federal, State, and municipal, but limits legislation under it to the prevention of discrimination between voters on account of race, color, and previous condition. The result is that Congress has general powers of legisla-

tion concerning Federal elections, but can legislate concerning State and municipal elections solely for the purpose of preventing discriminations on account of race.

As it is not thought probable that the court will, on this record, enter into a consideration of the power of Congress over State elections, it is not necessary to discuss the constitutionality of section 5507 in that respect. If, however, the court should desire to consider that question, I shall be glad to file an additional brief in respect thereto.

But it is proper to suggest briefly here, as fortifying the argument in the abstract, that the *general* right of suffrage, at State as well as Federal elections, is contemplated by the law if the crucial discrimination occurs, because—

1. The Constitution so indicates—

(*a*) The language of the Fifteenth Amendment being unqualified, "the right * * * *to vote;*"

(*b*) The language of section 2 of the Fourteenth Amendment, on an associated subject and showing a cognate intention, including elections for State as well as Federal officers.

2. The statutes show that intention: e. g., section 2004 obviously applies to State elections and officers, and section 2010, although now repealed by the act of February 8, 1894 (28 Stat., 36), may be cited to show how the original intent, still apparent in section 2004, was followed up in other provisions of the act of 1870.

3. The clear inference from decisions of this court is to the same effect.

In the *Reese* case it was said (92 U. S., 218):

> It has not been contended, nor can it be, that the Amendment confers authority to impose penalties for every wrongful refusal to receive the vote of a qualified elector at State elections. It is only when the wrongful refusal at such an election is because of race, color, or previous condition of servitude, that Congress can interfere, and provide for its punishment.

In the *Yarbrough* case (110 U. S., 664), when the court said, "the Fifteenth Amendment of the Constitution * * * clearly shows that the *right of suffrage* was considered to be of supreme importance to the national government," etc., it is evident from the paragraphs following that the learned judge who delivered the opinion had passed on from exclusive consideration of the right to vote for a member of Congress.

II.

POWER OF CONGRESS OVER THE ELECTION OF ITS MEMBERS.

The extent of the authority possessed by Congress over its own elections has been conclusively determined by the decisions of this court.

Ex parte Siebold (100 U. S., 371).
Ex parte Clarke (100 U. S., 399).
Ex parte Yarbrough (110 U. S., 651).

In *In re Coy* (31 Fed. Rep., 794), which involved the constitutionality of sections 5511 and 5515 of the

Revised Statutes of the United States, Mr. Justice Harlan, at the Circuit, said (pp. 803–804):

> The authority of Congress to enact the statutes to which reference has been made, is no longer an open question in the courts of the Union. Such legislation is authorized by that provision of the Constitution which invests Congress with power to make regulations as to the time and manner of holding elections for Representatives in Congress, or to alter such regulations as the State prescribes—Article I, section 4. The requirement that officers of elections, at which such Representatives are voted for, shall perform the duties imposed by the State in regard to such elections, is the same, in legal effect, as if Congress had, in the first instance, and by direct legislation, imposed those duties upon those officers. It would be extraordinary indeed if the nation could not prescribe penalties for the nonperformance of duties, in regard to elections for Representatives in Congress, by those exercising the functions of officers at such elections. It is immaterial that such officers are appointed by the State. When supervising elections for Representatives in Congress, they can be reached by the power of the United States and punished for neglect of the duties they assume to discharge. These views are sustained by the elaborate judgments of the Supreme Court of the United States in *Ex parte Siebold*, 100 U. S., 371; *Ex parte Clarke*, id., 399; and *Ex parte Yarbrough*, 110 U. S., 651, *in which the power of Congress*, either by direct legislation or by adopting the regula-

> tions established by the State, *to secure the integrity and freedom of elections, at which Representatives in Congress are chosen, is placed upon grounds that can not be shaken. Those cases cover the whole field of argument.*

The opinion of Mr. Justice Harlan, from which the above extract is made, appears as a note to the opinion of this court in *In re Coy* (127 U. S., 731, 733).

In *Ex parte Siebold* (100 U. S., 375) this court sustained the constitutionality of section 5515, Revised Statutes, which makes it a penal offense against the United States for any officer of election, at an election held for Representative in Congress, to neglect to perform or to violate any duty in regard to such election, whether required by a law of the State or of the United States, etc.; of section 5522, which makes it a penal offense for any officer or other person, with or without process, to obstruct, hinder, bribe, or interfere with a supervisor of election, or marshal, or deputy marshal, in the performance of any duty required of them by any law of the United States, or to prevent their free attendance at the places of registration or election, etc.; and of certain other sections authorizing the appointment of such supervisors and deputy marshals.

These sections were originally part of the Enforcement Act of May 31, 1870 (16 Stats., 140), and the supplement thereto of February 28, 1871 (Id., 433).

Siebold and four others were indicted in the Circuit Court of the United States for the District of Maryland for offenses alleged to have been committed by them

whilst acting as judges of election in the city of Baltimore at an election for Representative in Congress. Having been found guilty and sentenced to fine and imprisonment, they applied to this court for a writ of *habeas corpus*, alleging the unconstitutionality of the statutes.

The power of Congress to assume the *entire* regulation of the elections of Representatives was not questioned in the *Siebold* case. But it was urged that it had no authority to make partial regulations, to be carried out in conjunction with those made by the States, because, when exercised by Congress, such power was *exclusive*. The court held, however, that the power referred to might be exercised concurrently with the States, conflict being rendered impossible by reason of the paramount character of the regulations prescribed by Congress, which would supersede those made by the States so far as they were inconsistent therewith.

It was also objected that Congress had no authority to enforce State laws or to punish State officers, especially for violating the laws of their own State. But the court said (100 U. S., 387–388):

> As a general proposition, this is undoubtedly true; but when, in the performance of their functions, State officers are called upon to fulfill duties which they owe to the United States as well as to the State, has the former no means of compelling such fulfillment? Yet that is the case here. It is the duty of the States to elect Representatives to Congress. The due

> and fair election of these Representatives is of vital importance to the United States. The Government of the United States is no less concerned in the transaction than the State government is. It certainly is not bound to stand by as a passive spectator, when duties are violated and outrageous frauds are committed. It is directly interested in the faithful performance, by the officers of election, of their respective duties. Those duties are owed as well to the United States as to the State. This necessarily follows from the mixed character of the transaction—State and National. A violation of duty is an offense against the United States, for which the offender is justly amenable to that Government. No official position can shelter him from this responsibility. *In view of the fact that Congress has plenary and paramount jurisdiction over the whole subject*, it seems almost absurd to say that an officer who receives or has custody of the ballots given for a Representative owes no duty to the National Government which Congress can enforce; or that an officer who stuffs the ballot box can not be made amenable to the United States.

To the contention that the duty of keeping the peace rested upon the State alone, and that Congress could not authorize the appointment by the Circuit Courts of the United States of special officers to attend Congressional elections for that purpose, the court said (100 U. S., 394–395):

> Here again we are met with the theory that the Government of the United States does not

> rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that Government. We hold it to be an incontrovertible principle, that the Government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.

The principles announced in the *Siebold* case were affirmed in *Ex parte Clarke*, *supra*, and *United States* v. *Gale* (109 U. S., 65, 66).

The cases just referred to, while instructive as to the extent of the authority possessed by Congress over its own elections, all related to offenses committed by officers of election charged with certain duties under the laws of the United States and therefore did not involve the precise question here presented. The case of *Ex parte Yarbrough* (110 U. S., 651), however, is directly in point, as it involved the power of Congress to punish *private individuals* for offenses committed at Congressional elections. The principles announced in that case are decisive of the questions presented by this record.

Yarbrough and seven other persons were indicted, tried, convicted, and sentenced to imprisonment by the Circuit Court of the United States for the Northern District of Georgia, on a charge of conspiracy, based upon sections 5508 and 5520 of the Revised Statutes,

whereupon they made application to this court for a writ of *habeas corpus*, upon the ground that the proceedings in the Circuit Court under which they were held were illegal.

The sections referred to are as follows:

> SEC. 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office or place of honor, profit, or trust created by the Constitution or laws of the United States.
>
> SEC. 5520. If two or more persons in any State or Territory conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy, in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of the Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; each of such persons shall be punished by a fine of not less than five hundred dollars nor more than five thousand dollars, or by imprisonment, with or without hard labor,

> not less than six months nor more than six years, or by both such fine and imprisonment.

These sections come from the Enforcement Acts of May 31, 1870 (16 Stats., 140), and April 20, 1871 (17 Stats., 13), respectively.

Yarbrough and his associates were charged with having conspired to intimidate certain persons of African descent in the exercise of their right to vote for a member of Congress, in the execution of which conspiracy they beat, bruised, wounded, and otherwise maltreated them; and that they did this on account of their race, color, and previous condition of servitude, by going in disguise and assaulting them on the public highway and on their own premises, respectively. This was held to be a sufficient description of an offense embraced within the provisions of sections 5508 and 5520.

Speaking generally of the authority of the Federal Government over its own elections, the court, through Mr. Justice Miller, said (p. 657):

> That a government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration.
>
> If this Government is anything more than a mere aggregation of delegated agents of other

> States and governments, each of which is superior to the General Government, it must have the power to protect the elections on which its existence depends from violence and corruption.

Counsel in that case contended that in the absence of an *express* grant of authority to provide for preventing violence exercised on the voter as a means of controlling his vote, no such law could be enacted by Congress. But the court repudiated the contention, characterizing it as "the old argument often heard, often repeated, and in this court never assented to, that when a question of the power of Congress arises the advocate of the power must be able to place his finger on words which expressly grant it." "The principle, if sound," said the court, "would abolish the entire criminal jurisdiction of the courts of the United States and the laws which confer that jurisdiction." (p. 658).

After referring to the authority conferred upon Congress by Article I, section 4, of the Constitution, to make or alter the regulations which should be prescribed by the State legislatures, as to the times, places, and manner of holding elections for Senators and Representatives, and the action taken thereunder by Congress in changing the manner of electing Representatives from a general to a separate ticket and fixing the day on which such elections should be held throughout the United States, and also in requiring the two branches of the State legislature, when a Senator was to be elected, to meet in joint convention on a certain

day for that purpose, and continue to meet every day thereafter until a Senator was chosen, the court said (p. 661):

> Will it be denied that it is in the power of that body to provide laws for the proper conduct of those elections? To provide, if necessary, the officers who shall conduct them and make return of the result? And especially to provide, in an election held under its own authority, for security of life and limb to the voter while in the exercise of this function? Can it be doubted that Congress can by law protect the act of voting, the place where it is done, and the man who votes, from personal violence or intimidation, and the election itself from corruption and fraud?

To the objection that the parties assaulted by Yarbrough and his associates were not officers of the United States, and therefore their protection by Congress did not stand on the same ground—reference having been made in the opinion to the unquestioned authority of the statutes enacted by Congress for the protection of such officers in the exercise of their duties—the court said (p. 662):

> But the distinction is not well taken. The power in either case arises out of the circumstance that the function in which the party is engaged or *the right which he is about to exercise is dependent on the laws of the United States.*
>
> In both cases it is the duty of that Government to see that he may exercise this right freely, and to protect him from violence while

> so doing, or on account of so doing. This duty does not arise solely from the interest of the party concerned, but from the necessity of the Government itself, that its service shall be free from the adverse influence of force and fraud practiced on its agents, and that the votes by which its members of Congress and its President are elected shall be the *free* votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice.

As to the contention that the right to vote for a member of Congress was not dependent upon the Constitution or laws of the United States, but was governed by the law of the respective States, the court said (p. 663):

> If this were conceded, the importance to the General Government of having the actual election—the voting for those members—free from force and fraud is not diminished by the circumstance that the qualification of the voter is determined by the law of the State where he votes. It equally affects the Government, it is as indispensable to the proper discharge of the great function of legislating for that Government, that those who are to control this legislation shall not owe their election to bribery or violence, whether the class of persons who shall vote is determined by the law of the State, or by the law of the United States, or by their united result.

The court, however, did not leave the question in this uncertain state. It proceeded (p. 663):

> *But it is not correct to say that the right to vote for a member of Congress does not depend on the Constitution of the United States.*
>
> The office, if it be properly called an office, is created by that Constitution and by that alone. It also declares how it shall be filled, namely, by election.
>
> Its language is:
>
> "The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature." (Article I, section 2.)
>
> The States in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualification for voters for those *eo nomine*. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress.
>
> It is not true, therefore, that electors for members of Congress owe their right to vote to the State law *in any sense which makes the exercise of the right to depend exclusively on the law of the State.*

Explaining the statement in *Minor* v. *Happersett* (21 Wall., 162), that "the Constitution of the United States does not confer the right of suffrage upon anyone," the court said (p. 664):

> The court was combatting the argument that this right was conferred on all citizens, and therefore upon women as well as men. In opposition to that idea, it was said the Constitution adopts as the qualification for voters of members of Congress that which prevails in the State where the voting is to be done; therefore, said the opinion, the right is not definitely conferred on any person or class of persons by the Constitution alone, because you have to look to the law of the State for the description of the class. *But the court did not intend to say that when the class or the person is thus ascertained, his right to vote for a member of Congress was not fundamentally based upon the Constitution*, which created the office of member of Congress, and declared it should be elective, and pointed to the means of ascertaining who should be electors.

Having decided that the right to vote for a member of Congress was a right based upon the provisions of Article I, section 4 of the Constitution, giving Congress control over such elections, and that sections 5508 and 5520, Revised Statutes, were appropriate legislation to enforce and protect that right, it was not really necessary in the determination of the case for the court to consider the meaning and operation of the Fifteenth Amendment. Although the sections referred to were taken from the Enforcement Acts of

May 31, 1870, and April 20, 1871, and were primarily intended for the protection of the colored race, they contain no direct reference to that people, nor to discrimination on account of race, color, or previous condition, but apply equally to all citizens of the United States. The court referred to that Amendment, however, as showing that "the right of suffrage was considered to be of supreme importance to the National Government, and was not intended to be left within the exclusive control of the States," and also to correct some erroneous impressions which had evidently been formed as to the meaning of what had been said in *United States* v. *Reese*. In the latter connection, it was said (p. 665):

> While it is quite true, as was said by this court in *United States* v. *Reese* (92 U. S., 214), that this article gives no affirmative right to the colored man to vote, and is designed primarily to prevent discrimination against him whenever the right to vote may be granted to others, it is easy to see that under some circumstances it may operate as the immediate source of a right to vote. In all cases where the former slaveholding States had not removed from their Constitutions the words "white man" as a qualification for voting, this provision did, in effect, confer on him the right to vote, because, being paramount to the State law, and a part of the State law, it annulled the discriminating word *white*, and thus left him in the enjoyment of the same right as white persons. And such would be the effect of any future constitutional

provision of a State which should give the right of voting exclusively to white people, whether they be men or women. (*Neal* v. *Delaware*, 103 U. S., 370.)

In such cases this Fifteenth Article of Amendment does, *proprio vigore*, substantially confer on the negro the right to vote, and Congress has the power to protect and enforce that right.

In the case of *United States* v. *Reese*, so much relied on by counsel, this court said in regard to the Fifteenth Amendment, that "it has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is an exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude." This new constitutional right was mainly designed for citizens of African descent. *The principle, however, that the protection of the exercise of this right is within the power of Congress, is as necessary to the right of other citizens to vote* as to the colored citizen, *and to the right to vote in general* as to the right to be protected against discrimination.

The exercise of the right *in both instances* is *guaranteed by the Constitution*, and should be kept free and pure by Congressional enactments whenever that is necessary.

The court also said that the power of Congress to protect citizens of the United States in the exercise of their rights under the Constitution was not limited, as was its power under the first section of the Fourteenth

Amendment, to acts done under State authority, but extended to the acts of individuals as well (p. 666):

> For, while it may be true that acts which are mere invasions of private rights, which acts have no sanction in the statutes of a State, or which are not committed by anyone exercising its authority, are not within the scope of that Amendment, *it is quite a different matter when Congress undertakes to protect the citizen in the exercise of rights conferred by the Constitution of the United States essential to the healthy organization of the Government itself.*

III.

PERSONS TO WHOM THE RIGHT OF SUFFRAGE IS GUARANTEED BY THE FIFTEENTH AMENDMENT.

Section 5507, Revised Statutes, here in question, provides for the punishment of every person who, by means of bribery or certain forms of threats, prevents, hinders, controls, or intimidates another from exercising or in exercising the right of suffrage, "to whom that right is guaranteed by the Fifteenth Amendment to the Constitution of the United States."

In view of the decisions of this court in the *Yarbrough* and other cases, above referred to, the authority of Congress to protect voters at Federal elections against bribery and intimidation, by making such acts offenses against the United States, can not be questioned. But, it may be asked, who are the persons described in section 5507 as those to whom "the right of suffrage * * * is guaranteed by the Fifteenth Amendment?"

The Fifteenth Amendment provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

While this Amendment was chiefly designed for the further protection of the emancipated slaves, by indirectly conferring upon them the elective franchise, it is not limited, either in its terms or operation, to the negro race. (*Slaughter House Cases*, 16 Wall., 37, 71, 72.) All "citizens of the United States," of whatever race, color, or previous condition, are secured by its provisions against discrimination in the matter of voting. But, as the Fifteenth Amendment does not directly confer the right to vote (*United States* v. *Reese*, 92 U. S., 214), but that right is derived immediately from the State, which determines, in the first instance, the qualifications of all its voters, it follows that, in order to come within the protection of the Amendment, a citizen of the United States must be otherwise qualified to vote under the laws of his State. *Citizens of the United States, without regard to race, color, or previous condition of servitude, who are otherwise qualified to vote*, are, therefore, the persons, and the only persons, to whom the right of suffrage is guaranteed by the Fifteenth Amendment, and consequently the persons referred to in section 5507.

That this is the meaning to be attached to the language in question is shown by a reference to the act of 1870 (16 Stats. 140), from the fifth section of

which section 5507 was taken. As is well known, that act, like the Fifteenth Amendment, was primarily intended for the protection of the freedmen; but also, like that Amendment, it is not limited in its terms, nor can it be supposed that it was intended to be limited in its operation, to the colored race. It is entitled "An act to enforce the right of *citizens of the United States* to vote in the several States of the Union, and for other purposes;" and its first section provides:

> Be it enacted, etc., That *all citizens of the United States who are or shall be otherwise qualified by law to vote* at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, *without distinction of race, color, or previous condition of servitude;* any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

The propriety of referring to the act from which a section of the Revised Statutes is taken, for the purpose of ascertaining its meaning, where any ambiguity exists, has been often affirmed by this court.

In *Ex parte Crow Dog* (109 U. S., 556), it was necessary to determine whether the locality of a murder of which that Indian had been convicted was "Indian country," within the meaning of section 2145, Revised Statutes, extending the general laws of the United States for the punishment of crimes to that ter-

ritory. Section 2145 was taken from the Indian Intercourse Act of June 30, 1834 (4 Stats., 729, 733), the first section of which defined what should be deemed "Indian country." In this connection the court said (p. 560):

> Since the passage of that act great changes have taken place by the acquisition of new territory, by the creation of new States, and by the organization of Territorial governments; and the Revised Statutes, while retaining the substance of many important provisions of the act of 1834, with amendments and additions since made regulating intercourse with the Indian tribes, have, nevertheless, omitted all definition of what now must be taken to be "the Indian country." *Nevertheless, although the section of the act of 1834 containing the definition of that date has been repealed, it is not to be regarded as if it had never been adopted, but may be referred to in connection with the provisions of its original context which remain in force*, and may be considered in connection with the changes which have taken place in our situation, with a view of determining from time to time what must be regarded as Indian country where it is spoken of in the statutes. *It is an admitted rule in the interpretation of statutes that clauses which have been repealed may still be considered in construing the provisions that remain in force.* (Bramwell, L. J., in *Attorney-General* v. *Lamplough*, L. R. 3 Ex. D., 223–227; Hardcastle on Statutory Law, 217; *Bank for Savings* v. *Collector*, 3 Wall., 495–513; *Commonwealth* v. *Bailey*,

> 13 Allen, 531.) This rule was applied in reference to the very question now under consideration in *Bates* v. *Clark*, 95 U. S. 204, decided at the October term, 1877.

In *United States* v. *Le Bris* (121 U. S., 278), the same question was again before this court. Referring to section 1 of the act of June 30, 1834, defining the "Indian country," the court said (p. 280):

> This section was not reenacted in the Revised Statutes, though other parts of the statute were. Consequently the section was repealed by section 5596 of the revision; but still we held, in *Ex parte Crow Dog* (109 U. S., 556, 561), that it might be referred to for the purpose of determining what was meant by the term "Indian country," when found in sections of the Revised Statutes which were reenactments of other sections of this statute. * * * The repeal of this section does not of itself change the meaning of the term it defines when found elsewhere in the original connection. *The reenacted sections are to be given the same meaning they had in the original statute unless a contrary intention is plainly manifested.*

In *United States* v. *Hirsch* (100 U. S., 33) the court said (p. 35):

> It must be admitted that in construing any part of the Revised Statutes it is admissible, and often necessary, to recur to its connection in the act of which it was originally a part.

See also *United States* v. *Bowen* (100 U. S., 508, 513).

It is also settled that the title of an act may be considered in determining the intention of the legislature.

Church of the Holy Trinity v. *United States* (143 U. S., 457, 462).

Coosaw Mining Co. v. *United States* (144 U. S., 550, 563).

The fact that the section in which an ambiguity is found is *penal* in its nature, and therefore to be construed strictly, does not preclude resort to the original act for the purpose of discovering the legislative intention. (*United States* v. *Lacher*, 134 U. S., 624, 626).

Applying these principles, and giving to the words in section 5507, Revised Statutes, the meaning they had in section 5 of the act of 1870, it is clear that the persons referred to as those "to whom the right of suffrage is guaranteed by the Fifteenth Amendment" are citizens of the United States, of whatever race, color, or previous condition, otherwise qualified to vote under the laws of their respective States, as stated in section 1 of the act of 1870.

But even if the question were to be determined independently of the act of 1870, the same conclusion would be reached. The necessary effect of the Fifteenth Amendment in prohibiting discrimination against citizens of the United States in the matter of voting because of their race, color, or previous condition is to secure or guarantee that right to all such citizens, of whatever color, white as well as black, who are otherwise qualified under the State law to exercise it. No other meaning can possibly be attributed to the language used.

In the *Yarbrough case* the court said (110 U. S., 665):

> This new constitutional right ["exemption from discrimination"] was mainly designed for citizens of African descent. The principle, however, that the protection of the exercise of this right is within the power of Congress, is as necessary to the right of other citizens to vote as to the colored citizen, *and to the right to vote in general* as to the right to be protected against discrimination. *The exercise of the right in both instances is guaranteed by the Constitution*, and should be kept free and pure by Congressional enactments whenever that is necessary.

But here we do not need to argue for the broadest contents of the Fifteenth Amendment. We are dealing in this case with colored persons, those for whom such rights were mainly designed. No defect in form, or even in substance, in the indictment was brought forward. The petitioner relied solely on the unconstitutionality of the law. Besides, as was said in *Ex parte Yarbrough*, jurisdiction only is involved, the writ of *habeas corpus* can not be converted into a writ of error, and this court will not inquire into the sufficiency of the indictment. Whether the indictment sets forth duly and correctly the statutory offense, "is in every case a question of law which must necessarily be decided by the court in which the case originates, and is therefore clearly within its jurisdiction." If that point may still be raised, it must be raised below.

Again, any doubt as to Federal control over State elections—as to the scope of national protection to the

right of suffrage in general—is eliminated, because the election was for a Representative in Congress.

The statute providing protection to those "to whom that right [of suffrage] is guaranteed by the Fifteenth Amendment to the Constitution of the United States," connects itself with the language and purpose of the Amendment, and indicates necessarily citizens of the United States whose right to vote is in any way interfered with or abridged on account of race, color, or previous condition of servitude. It is beyond question, under the decisions cited, that this Amendment operates not only as a negative protection, as a prohibition against the United States and the States, like the early Amendments against the former and the Fourteenth Amendment against the latter sovereignties; but also operates affirmatively against individuals, and supports legislation to that end. In this respect it resembles the Thirteenth Amendment, which is an absolute fiat against slavery, and would support all legislation necessary or proper to its suppression.

I have indicated the reasons why it can not be suggested that it does not appear under this indictment that these colored persons were bribed on account of their race, or in pursuance of a discrimination against their race. This court will take that averment (if necessary) as sufficiently appearing, as essentially inferred, or as waived, at least at this stage. There is no question here but constitutionality. And, respecting the purpose and reach of the amendment and the statute, *non constat* that the mere fact of bribery

operating on colored individuals susceptible to that base appeal, easily swayed by petty cupidity, and subjected to covert and conspiring political motives either to vote or not to vote (as the case might be), would not in itself constitute a discrimination on account of race, color, etc. For, as strengthening that thought, we are to remember what was said by Justice Miller for the court in the *Yarbrough* case, with the emphasis of reiteration, that not only violence but corruption is to be guarded against—"the temptations to control these elections by violence and by corruption is a constant source of danger;" the destiny of the country is "at the mercy of the combinations of those who respect no right but brute force, on the one hand, and unprincipled corruptionists on the other." (110 U. S., 666, 667.) The learned Justice was considering sections of the statutes which presented the notion of conspiracy and violence rather than corruption; and yet he went out of his way (so to speak) to emphasize the danger of bribery; and the provisions then in the statutes most forcibly directed against bribery are section 5507 now before the court, and the other sections held to be unconstitutional (in the Reese case) before the Yarbrough case was decided. And on this point the fact that section 5507 was *not* repealed by the act of 1894 is instructive and significant.

In conclusion, I recall the court's attention with especial emphasis to the great principle deliberately decided by a unanimous court in the Yarbrough case, viz, that in elections for members of Congress the

power of Congress is ample and untrammeled under section 4 of Article I of the Constitution (110 U. S., 661, 662):

> Will it be denied that it is in the power of that body to provide laws for the proper conduct of those elections? To provide, if necessary, the officers who shall conduct them and make return of the result? And especially to provide, in an election held under its own authority, for security of life and limb to the voter while in the exercise of this function? Can it be doubted that Congress can by law protect the act of voting, the place where it is done, and the man who votes, from personal violence or intimidation, and the election itself from corruption and fraud?
>
> * * * * *
>
> But when, in the pursuance of a new demand for action, that body, as it did in the cases just enumerated, finds it necessary to make additional laws for the free, the *pure*, and the safe exercise of this right of voting, they stand upon the same ground and are to be upheld for the same reasons.

I submit that the judgment below should be reversed and the appellee be remanded to the custody of the marshal in default of bail, and pending trial.

HENRY M. HOYT,
Assistant Attorney-General.
W. R. HARR.

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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

A. D. JAMES, UNITED STATES MARSHAL for the Western District of Kentucky, and the United States, appellants,
v.
HENRY BOWMAN.

No. 213.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

REPLY BRIEF FOR THE UNITED STATES.

24303

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REPLY BRIEF FOR THE UNITED STATES.

Counsel for appellee, although admitting the power of Congress to punish bribery at Federal elections, contend that section 5507 of the Revised Statutes is unconstitutional because it is not *in terms* confined to such elections.

This contention is based upon the assumption that section 5507 relates to bribery in its broadest aspect, and not simply to bribery committed because of the race, color, or previous condition of the voter—a question which has never been decided, and which, in my view, it is not necessary to decide in this case.

But conceding, for the sake of argument, that section 5507 does relate to bribery *per se*, why should it

not stand, since it is within the power of Congress over Federal elections? The answer made is, that the statute contemplates State elections as well, and, in the language of the *Reese case* (92 U. S., 221), "the legislature can not set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who should be rightfully detained and who set at large."

But the language of the *Reese case* must be construed with reference to the particular question then before the court—the validity, or rather the *appropriateness*, of an act of Congress considered solely with reference to the power of that body, under the Fifteenth Amendment, to interfere at State elections. This is certainly not the question presented here.

I.

Both sections of the act of May 31, 1870 (16 Stat., 140), involved in the *Reese case*, were general in their nature, and, as the court held, either in terms or by necessary implication related to State as well as Federal elections. Section 3 provided that the offer to perform any act prerequisite to voting, if it failed because of the wrongful act or omission of the person or officer charged with the duty of receiving or permitting such performance, should be deemed a performance of the act, and imposed a penalty upon the officer of elections wrongfully refusing to receive the vote of the person making the offer. Section 4 provided that any person unlawfully obstructing, or combining with others to

obstruct, any citizen from qualifying himself to vote, or from voting, should be punished as prescribed therein.

Neither of these sections, it will be observed, contained any reference to the Fifteenth Amendment, or to discrimination on account of race, color, or previous condition of servitude.

The question which the court decided in the *Reese case* is best stated in its own language (92 U. S., 216):

> In this court the United States abandon the first and third counts, *and expressly waive the consideration of all claims not arising out of the enforcement of the Fifteenth Amendment* of the Constitution.
>
> After this concession, the principal question left for consideration is, whether the act under which the indictment is found can be made effective for the punishment of inspectors of elections who refuse to receive and count the votes of citizens of the United States, having all the qualifications of voters, *because of their race, color, or previous condition of servitude.*

After stating that the Fifteenth Amendment does not confer the right of suffrage upon anyone, but prevents the States, or the United States, from giving preference in this particular to one citizen of the United States over another on account of race, color, or previous condition, which before its adoption could be done, and that the Amendment had invested citizens of the United States with the constitutional right to be exempt from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude—a right which, under the second

section of the Amendment, Congress could enforce by "appropriate legislation"—the court said (p. 218):

> This leads us to inquire whether the act now under consideration is "appropriate legislation" for that purpose. The power of Congress to legislate at all upon the subject of voting at State elections rests upon this amendment. *The effect of Article I, section 4 of the Constitution, in respect to elections for Senators and Representatives, is not now under consideration.*

The court then analyzed sections 3 and 4 of the act of 1870, and said (p. 220):

> In view of all these facts, we feel compelled to say that, in our opinion, the language of the third and fourth sections does not confine their operation to unlawful discriminations on account of race, etc. If Congress had the power to provide generally for the punishment of those who unlawfully interfere to prevent the exercise of the elective franchise without regard to such discrimination, the language of these sections would be broad enough for that purpose.

The court then added (pp. 220–221):

> There is no attempt in the sections now under consideration to provide specifically for such an offense [an offense based on discrimination because of race, etc.]. If the case is provided for at all, it is because it comes under the general prohibition against any wrongful act or unlawful obstruction in this particular. We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, *with its limited powers*, which is, in general language, broad

> enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is whether we can introduce words of limitation into a penal statute so as to make it specific when, as expressed, it is general only.

In conclusion, the court said (pp. 221–222):

> To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.
>
> *We must, therefore, decide that Congress has not as yet provided by "appropriate legislation" for the punishment of the offense charged in the indictment*, and that the Circuit Court properly sustained the demurrers and gave judgment for the defendants.

Clearly, then, the only point decided in the Reese case was that Congress, in the exercise of its limited powers

under the Fifteenth Amendment, can not pass a statute for the enforcement of that Amendment which exceeds those powers, and expect the courts to uphold the statute by restricting it within the constitutional limits. The court did not say, or intimate, that the statute was unconstitutional as an exercise of the power of Congress under the fourth section of the First Article of the Constitution with reference to Federal elections. On the contrary, it expressly avoided that question. It merely held that the act was not "appropriate legislation" for the enforcement of the Fifteenth Amendment.

II.

The principle applied in the *Trade-Mark Cases* (100 U. S., 82) was precisely that enunciated in the *Reese case*, and is therefore equally inapplicable to the present case. The court itself recognized that fact. It said (p. 98):

> It has been suggested that if Congress has power to regulate trade-marks used in commerce with foreign nations and among the several States, these Statutes shall be held valid in that class of cases, if no further. To this there are two objections: First, the indictments in these cases do not show that the trade-marks which are wrongfully used were trade-marks used in that kind of commerce. Secondly, while it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words

> used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body. *This precise point was decided in United States* v. *Reese* (92 U. S., 214).

The act of Congress involved in the *Trade-Mark Cases* was, as the court held, general in its nature: "It is a general declaration that anybody in the United States, and anybody in any other country which permits us to do the like, may, by registering a trade-mark, have it fully protected" (100 U. S., p. 97). But the only power which Congress had over the subject of trade-marks was that derived from the commerce clause of the Constitution, and was limited to trade-marks which might be used in interstate or foreign commerce. It was absolutely essential, therefore, as the court held, that Congress, when legislating on the subject of trade-marks, should keep within the confines of its jurisdiction, and in the act itself indicate that it was dealing only with trade-marks in their relation to interstate or foreign commerce.

But the situation is very different when Congress is legislating in the exercise of its broad, general power over a given subject. If, for instance, in legislating generally on the subject of interstate and foreign commerce, an act of Congress should contain provisions on the subject of trade-marks, which, under one construction, might be made to apply to trade-marks generally, whether used in interstate or foreign commerce or not,

it is manifest the court would refuse to adopt such a construction and hold that the act was void because it was not *in terms* confined to the legislative domain. On the contrary, the court would say it must be presumed that Congress was legislating with regard simply to the subject within its constitutional control. This, in fact, is what the court did say or imply in the *Trade-Mark Cases* (100 U. S., 96):

> When, therefore, Congress undertakes to enact a law which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, *or from its essential nature*, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. If not *so* limited, it is in excess of the power of Congress.

In such a case, therefore, it is the intention on the part of Congress *to go outside its jurisdiction*, which must be clearly and explicitly shown.

So, in the present case, Congress, as this court has held, possesses "plenary and paramount jurisdiction over the whole subject" of Federal elections (*Siebold case*). It also has a limited control over State elections. Shall it be said, then, unless it clearly and explicitly appears from the language used, that an act of Congress, which is authorized only with respect to Federal elections, was intended to embrace State elections, is void unless it is *in terms* confined to Federal elections? Such a rule would be diametrically opposed to the well-settled principles of statutory construction, namely, that a statute shall not be held

unconstitutional unless it is "clearly and palpably" so; and that, where two constructions are possible, the one which supports the statute will be adopted.

The rule in regard to the strict construction of penal statutes also throws some light on this subject. It would probably be argued, in a case arising under section 5507 at a State election, that that section had no application, because it does not plainly appear that it was intended to apply to such elections; that it applies to intimidation and bribery generally, and not to such offenses committed because of the race, color, or previous condition of the voter; and that Congress possesses the power to punish those acts, when the discriminative element is absent, only when committed at Federal elections.

III.

The fact that section 5507 refers to "persons to whom the right of suffrage is guaranteed by the Fifteenth Amendment," does not necessarily imply that Congress was legislating, as counsel assume, simply for the enforcement of the Fifteenth Amendment, and in virtue only of the power given by that Amendment. Congress was undoubtedly legislating primarily, so far as its immediate purpose was concerned, for the protection of the particular class of persons to whom the right of suffrage was, as matter of fact, not only guaranteed but *secured*, or intended to be secured, by the Fifteenth Amendment—the Negro race. But the court would be no more justified in saying that Congress, in the passage of the act in question, was legislating solely

in virtue of the power derived from the Fifteenth Amendment, because of the reference to that Amendment, than in holding that the Fifteenth Amendment was itself applicable only to the Negro race, because it had its origin in the peculiar circumstances attending that race after their emancipation.

IV.

But the only inquiry, I submit, on this record is whether section 5507 is a legitimate exertion of constitutional power for the protection of voters at *Federal* elections. The question as to its application to State elections may be considered when a proper case arises. It is no more necessary for this court now to consider whether the statute is constitutional in respect of State elections, than it was for the court in the *Yarbrough case* to determine whether section 5508 was valid as applied to State elections. That section was equally general in its terms, and could be said with equal force to have contemplated State as well as Federal elections—in fact, it has been so regarded. But this court did not deem it necessary to enter into that question in the *Yarbrough case*, and it was left for the Circuit Court of Appeals for the Sixth Circuit (in the *Karem case;* appendix to appellee's brief) to determine that section 5508 "is not appropriate legislation for the enforcement of the Fifteenth Amendment." Would this court, if that view had been announced earlier, have declared that, *for that reason*, section 5508 was not constitutional as applied to cases arising under it at Federal elections?

V.

In order to minimize the effect of the decision of the Circuit Court for the Eastern District of Virginia in the *Munford case* (16 Fed. Rep., 223), counsel emphasize its statement (p. 227) that Congress, after the argument in the *Reese case*, reenacted the section there in question (sec. 4 of the act of 1870; sec. 5506 R. S.), "leaving out the words which, in the case of Reese, had been considered to bring it under the Fifteenth Amendment." If this statement means what counsel would have the court imply—that the Circuit Court thought that, because the original statute could have been construed to apply to State elections, it would have been invalid as to Federal elections—the language of that court at the close of its opinion is inexplicable. It said (p. 228):

> The court in the *Reese case* decided that section 5506 was not appropriate legislation to enforce the Fifteenth Amendment. The section said nothing of race, color, and previous condition. It was at a municipal election, and therefore was not within the power of Congress under section 4, Article 1, of the Constitution, which gives power to Congress over Federal elections. *Had the same crime been committed at a Federal election* the court would, we think, have found the authority for section 5506 *under the fourth section, Article 1,* above recited.

It is to be observed that when the Circuit Court said, in the paragraph quoted, that "Had the same crime been committed at a Federal election the court would, we think, have found the authority for *section*

5506 under the fourth section, Article 1," it meant section 4 of the act of 1870. This is clear from the first line of that paragraph, "The court in the *Reese case* decided that *section 5506* was not appropriate legislation to enforce the Fifteenth Amendment." The Circuit Court undoubtedly referred, in both instances, to the original statute, which was before the Supreme Court in the *Reese case*.

The concurring opinion of Judge Hughes makes this point perfectly clear. Referring to the opinion of this court in the *Reese case*, he said (p 229):

> Its opinion in *Reese et al.* was expressly confined to *section 4 of the act of 1870* in its relation to State elections, and the court held that section not to be within the purview of the Fifteenth Amendment of the Constitution. But, even as to that section, the court did not, *and took especial pains not to*, decide that the section was beyond the purview of the first Article of the Constitution.

In view of the principles subsequently announced in the *Yarbrough case*, the surmise of the Circuit Court in the *Munford case*, as to the probable position that would have been taken by this court in the *Reese case*, if the constitutionality of section 4 of the act of 1870 had been considered, in a case arising at a Federal election, with respect to the power of Congress under the fourth section of Article I of the Constitution, would seem to be correct.

VI.

In the *Reese case*, as already observed, this court decided, and only decided, that the statutes under con-

sideration were not "appropriate legislation" for the enforcement of the Fifteenth Amendment—that if Congress, in the exercise of its *limited* power under that Amendment, enacted legislation which exceeded that power, such legislation must fall, because the courts had no authority to amend or restrict a statute by construction so as to confine it within constitutional limits. It was not decided in the *Reese case*—and it can not be held to have been decided—that the statutes then under consideration were invalid as applied to Federal elections because they were not "appropriate legislation" to enforce the Fifteenth Amendment. The consideration of all questions not arising out of the enforcement of the Fifteenth Amendment—and perticularly the power of Congress over Federal elections under the fourth section of the First Article of the Constitution—was, as stated, waived by counsel and avoided by the court. *Is not this fact itself a complete answer to appellee's contention? Does it not show that, in a case arising under a general statute, it is not necessary to consider the validity of the statute from any other point of view than that presented by the record?*

If the court *had* considered the constitutionality of the sections of the Enforcement Act involved in the *Reese case* in the light of the power of Congress under the First Article of the Constitution, it would have been confronted with this proposition: Congress, under that Article, has plenary and paramount jurisdiction over Federal elections, and, in virtue of the Fifteenth Amendment, has the additional right to prevent discrimination against citizens of the United States in the exercise of their right to vote at all elections, State and

Federal; but the sections under consideration made no provision for acts committed because of the race, etc., of the citizen. The inevitable conclusion would therefore have been that those sections were not "appropriate legislation" to enforce the Fifteenth Amendment, and consequently did not apply to State elections, *but were limited in their application to Federal elections* which Congress was authorized so to protect.

VII.

In the present case, if the words in section 5507, "persons to whom that right [of suffrage] is guaranteed by the Fifteenth Amendment," are to be treated as merely descriptive, and to mean "citizens of the United States without regard to race, color, or previous condition of servitude, otherwise qualified to vote," then we have a statute which provides simply for punishing the bribery or intimidation of citizens of the United States in the matter of voting. In a case, therefore, like the present one, of bribery committed at a *Congressional* election, the question is merely whether the statute is applicable. Will the court go beyond the necessities of such a case and say that, while the statute covers offenses committed at Federal elections, it is questionable whether it does not cover or attempt to cover similar offenses committed at a State election; that the latter fact must be inquired into, and if it be found that Congress may have intended to embrace acts not within its jurisdiction over State elections, the statute is void with respect to Federal elections? Is it not the better rule, as already suggested, to say that Congress must be presumed, until the contrary is plainly shown, to

have intended to keep within its constitutional jurisdiction? Will it not be held that a statute, general in its nature, must be construed as applying to the subject over which Congress has general control? And if the application of a general law to a particular kindred subject, over which Congress has but a limited control, is to be considered at all in a case which directly involves only its application to an individual or object manifestly within the *general* class and the *broad* power, will the law be held to extend to the kindred subject (and for that reason, if that *be* a sufficient reason, adjudged unconstitutional) unless its language is so clear and explicit as unavoidably to require such a construction?

VIII.

The questions as to the constitutionality of section 5507 in respect of Federal elections, and its application or constitutionality as to State elections, are, I submit, distinct and separable. The validity of the statute in the one case can not be made to depend upon its validity, or the circumstances which would control its validity, in the other case. It can not be doubted that a law containing no substantive provision beyond the power of Congress—no provision clearly encroaching upon a field outside the competency of Congress—is none the less constitutional because there are *occasions* (in this instance, State elections) with respect to which its application might be challenged.

In a case arising under section 5507 at a *Federal* election, it can not be said, as was said in the *Reese case* (where the acts in question were committed at a *State* election), that section 5507 provides for an OFFENSE

not within the jurisdiction of Congress. The power of Congress to punish bribery *per se* at a Federal election, without regard to motive, is not and can not be disputed. The court would not therefore, in such a case, which is *this* case, be called upon (as in the *Reese case*) to alter or amend the statute so as to make it relate to an OFFENSE within the control of Congress. Whether section 5507 relate to bribery pure and simple, or to bribery committed because of the race, color, or previous condition of the voter, it is entirely within the power of Congress over Federal elections. The power to punish bribery *per se* being conceded, no question can be raised as to the power to punish bribery for any cause. The greater power necessarily includes the less.

The argument of counsel for appellee is therefore reduced to this—and it would be unworthy serious consideration if it had not *apparent* support in what was said by the court in the *Reese* and *Trade-Mark cases:* The statute is invalid, not because it exceeds the authority of Congress over Federal elections, but because *possibly* it may also contemplate State elections, and, *if so construed*, it may be doubted whether the offense for which it provides is within the power of Congress over *such* elections, in which case—for this purely hypothetical defect the statute, otherwise sound, is necessarily invalidated in all its parts. It is to be hoped the court will enjoy this trip around Robin Hood's barn in order to discover wherein section 5507 is unconstitutional with respect to Federal elections.

HENRY M. HOYT,
Solicitor-General.

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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 213.

A. D. JAMES, U. S. MARSHAL, ETC., ET AL., APPELLANTS,

v.

HENRY BOWMAN.

BRIEF FOR APPELLEE.

SWAGAR SHERLEY,
Counsel for Appellee.

W. B. DIXON,
Of Counsel.

(18,357.)

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Supreme Court of the United States

OCTOBER TERM, 1902.

No. 213.

A. D. JAMES, UNITED STATES MARSHAL FOR THE WESTERN DISTRICT OF KENTUCKY, AND THE UNITED STATES, APPELLANTS,

v.

HENRY BOWMAN, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

BRIEF FOR APPELLEE.

STATEMENT.

In December, 1900, an indictment was found by the United States district court for the district of Kentucky against the appellee, Henry Bowman, and one Harry Weaver, based upon section 5507 of the Revised Statutes of the United States. The indictment charged in substance that certain "negroes, colored men, men of African descent,

and not white men," being citizens of Kentucky and of the United States, were unlawfully and feloniously intimidated and prevented from exercising their lawful right of voting at a certain election held in the fifth congressional district of Kentucky on the 8th day of November, 1898, for the election of a Representative in the Fifty-sixth Congress of the United States, by means of bribery.

No allegation is made that the bribery was because of the race, color, or previous condition of servitude of the men bribed. The appellee, Henry Bowman, having been arrested and held in default of bail, sued out a writ of *habeas corpus* on the ground of the unconstitutionality of section 5507. The district judge granted the writ, following reluctantly the decision of the circuit court of appeals for the sixth circuit, rendered in the case of Lackey *v.* United States, 46 C. C. A., 189. From that judgment the Government has taken this appeal.

ARGUMENT.

It may simplify somewhat the question to be decided if we set forth just what, in our judgment, as shown by the decisions of this court, the power of Congress is and the sources of that power, both as to Federal and State elections, and then consider how far Congress has by appropriate legislation exercised such power. We shall therefore briefly state our conclusions and then show the basis for them.

1. Congress has power, irrespective of the fifteenth amendment, to make punishable offenses committed at a Federal election, and this power is not limited to

offenses committed against the negro, nor because of race prejudice, &c.; nor is it limited to offenses of a State or some agency of a State, but applies to the individual citizen.

2. The fifteenth amendment is the only source of power that Congress has as to State elections; and both as to State and Federal elections the power it confers upon Congress for the punishment of offenses against the suffrage is limited to offenses against citizens because of race prejudice, &c., and when committed by the United States or a State, or some officer or agent of the United States or a State.

3. There is now no statute relating to offenses committed at a Federal election based on the power derived by Congress from the Constitution, irrespective of the power given by the fifteenth amendment, except section 5508, which is not involved in this case.

a. Section 5507, upon which the indictment is founded, is based by its terms upon the fifteenth amendment, but is not appropriate legislation thereunder.

b. It is not within the province of the courts to so limit a statute by judicial construction as to make it operate only as to that which Congress may rightfully prohibit and punish.

I.

That Congress has power to control Federal elections and to make punishable offenses committed against the suffrage at such elections, irrespective of any power derived from the fifteenth amendment, has been determined by this court in several instances. In the case of *Ex parte* Siebold, 100 U. S., 375, and in *Ex parte* Clarke, 100 U. S., 399, this right was expressly recognized. Those cases came before this court by virtue of a writ of *habeas corpus* sued out by Siebold, Clarke, and others, based on the unconstitutionality of certain sections of the enforcement act, under which indictments had been found against them. *These sections related to congressional elections only.* Section 5515 made it a penal offense for any officer of election at a congressional election to neglect to perform or to violate any duty in regard to such election, whether required by a State or a United States law. Section 5522 made it a penal offense for any person to obstruct, bribe, or interfere with a supervisor of election or marshal in the performance of any duty required of them by any United States law, &c. All the indicted men were officers of election. Justice Bradley, in rendering the decision of this court, held these sections constitutional and in emphatic language declared the power of Congress to regulate and control Federal elections and make punishable offenses committed at such elections. Such power in Congress was not rested upon the fifteenth amendment, but on the provisions relative to the election of Representatives and the broad power of protecting the sources of its own existence. In the case of *Ex parte* Yarbrough, 110 U. S., 651,

these cases were approved and followed, and so far as the actual facts decided, the court went a step further and held an indictment under sections 5508 and 5520 found against an individual citizen, not an officer of an election, to be good. These cases were further approved in Logan *v.* United States, 144 U. S., 263. This power of Congress in congressional elections, founded on the Constitution irrespective of the fifteenth amendment, it is needless to say is not restricted to offenses committed on account of race, color, or previous condition of servitude, nor to acts of State or Federal governments or their agents. It was perhaps unnecessary to speak of these cases here or to discuss this head, as counsel for the Government and ourselves are in accord as to the power of Congress in regard to congressional elections. But since, in our judgment, counsel has overlooked the difference between the power of Congress and the exercise of that power by appropriate legislation, we have thought it well to make plain our assent to the proposition of the power of Congress that it may not be confused with the other question which we discuss later. It may be noticed in passing that none of the sections considered in the cases quoted above are involved in the case at bar.

II.

The fifteenth amendment provides:

"SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

"SECTION 2. The Congress shall have the power to enforce this article by appropriate legislation."

This amendment is the sole source of power whereby Congress is vested with the right to legislate as to State elections, but it is in addition to this a curb on the power of Congress to legislate as to congressional elections. By its very terms it applies both to the Federal and State governments. What is prohibited to one is also prohibited to the other. The effect is to both enlarge and curtail congressional power. Prior to its adoption the States could fix what qualifications or make such discriminations they thought fit as to the right to the franchise; now, so far as race, color, or previous condition of servitude is concerned, they may not. It did not confer the right to vote; it only removed certain disabilities from such right. Practically, where the only disabilities existing were those growing out of race or color, it did, by the removal of them, give indirectly the right—that is, it gave an equal right to the negro with the white man to vote, but it is still within the province of the State to take away from both the white man and the negro the right to vote because of some condition or requisite other than race, color, or previous condition of servitude. With equal force does it apply to the United States. If it were possible now for a State to limit the franchise to white men, Congress could not adopt such limitation as to the suffrage in congressional elections.

The second clause of the fifteenth amendment provides that "the Congress shall have the power to enforce this article by appropriate legislation." Now, in order for legislation making penal acts against the suffrage to be appropriate legislation *under this amendment*, such acts must be committed on account of race, color, or previous condition of servitude, and must be committed by the State or some agent of the State clothed with State power, though not

necessarily acting within or in accordance with such State power. *So far as this amendment is concerned*, and we are now to be considered as limiting ourselves to it, the same would be true as to the United States and its officers or agents.

That these views are in full accord with the decisions of this court we feel confident. In United States *v.* Reese, 92 U. S., 214, the court said :

"The fifteenth amendment does not confer the right of suffrage upon any one. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color or previous condition of servitude. Before its adoption this could be done. It was as much within the power of a State to exclude citizens of the United States from voting on account of race, etc., as it was on account of age, property, or education. Now it is not.

"If citizens of one race, having certain qualifications are permitted by law to vote, those of another have the same qualifications must be. Previous to this amendment there was no constitutional guaranty against this discrimination. Now there is. It follows that the amendment has invested the citizens of the United States with a new constitutional right, which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. This, under the express provisions of the second section of the amendment, Congress may enforce by 'appropriate legislation.'"

In U. S. *v.* Cruikshank, 1 Woods, 308, Justice Bradley, referring to this amendment, said :

"It does not confer the right to vote. That is the prerogative of the State laws. It only confers a right not to be

excluded from voting by reason of race, color, or previous condition of servitude, and this is all the right that Congress can enforce."

And again:

"It is not the right to vote which is guaranteed to all citizens. Congress cannot interfere with the regulation of that right by the States except to prevent by appropriate legislation any distinction as to race, color, or previous condition of servitude. The State may establish any other conditions and discriminations it pleases, whether as to age, sex, property, education, or anything else."

On appeal (United States *v.* Cruikshank, 92 U. S., 555), this court, through Chief Justice Waite, said:

"In Minor *v.* Happersett, 21 Wall., 178, we decided that the Constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the States. In United States *v.* Reese *et al.*, *supra*, we held that the fifteenth amendment has invested the citizens of the United States with a new constitutional right, which is exemption from discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been."

It is true that these views were explained in *Ex parte* Yarbrough, and so far as the statement that "the Constitution of

the United States does not confer the right of suffrage upon any one" is concerned, were repudiated, yet nothing in that case changed the court's position so far as the fifteenth amendment is concerned. In the Yarbrough case the court, dealing with a Federal election, left the fifteenth amendment, and under section 4 of article I of the Constitution found power relative to the right of suffrage in such elections. Congressional legislation relating only to that amendment is subject to the limitations declared in the Reese and Cruikshank cases, and is not enlarged by anything said in the Yarbrough case.

The circuit court of appeals for the sixth circuit has just rendered a decision involving these questions in the case of Karem *v.* United States. The opinion has not yet been reported in any publication, but we have received a record copy from which we quote. Karem, with certain other persons, was indicted in the district court for the western district of Kentucky for violation of section 5508 of the Revised Statutes. The indictment, in substance, charged him with having conspired with others to injure, oppress, threaten, and intimidate certain negroes in the free exercise of the right of suffrage at a State election on account of their race, color, and previous condition of servitude. Section 5508 provides:

"If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another with intent to prevent or hinder his free exercise or enjoy-

ment of any right or privilege so secured, they shall be fined not more than $5,000 and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

The circuit court of appeals held that said section did not embrace offenses committed at a State election and reversed the case, with instructions to sustain the demurrer to the indictment. The court, after commenting on the fact that section 5508 was not dependent upon the fifteenth amendment for its validity and reviewing the Yarbrough case and others, said:

"The fifteenth amendment is therefore a limitation upon the powers of the States in the execution of their otherwise unlimited right to prescribe the qualification of voters in their own elections, and the power of Congress to enforce this limitation is necessarily limited to legislation appropriate to the correction of any discrimination on account of race, color, or condition. The affirmative right to vote in such elections is still dependent upon and secured by the constitution and laws of the State, the power of the State to prescribe qualifications being limited in only one particular.

"The right of the voter not to be discriminated against at such elections on account of race or color is the only right protected by this amendment, and that right is a very different right from the affirmative right to vote.

"There are certain very obvious limitations upon the power of Congress to legislate for the enforcement of this article.

"1st. Legislation authorized by the amendment must be addressed to State action in some form or through some agency.

"2d. It must be limited to dealing with discrimination on account of race, color or condition.

"These in their order:

"First. That State and not individual action is the subject of this article would seem clear from many considerations.

"The right to vote in a purely State election being, as we have seen, a right granted by and dependent upon the law of the State, is therefore a right which can only be denied or abridged by the State.

"The amendment is therefore in terms addressed to State action. Action by the United States and by the State in contravention of this right of non-discrimination on account of race, color, or condition is inhibited. It has been argued that the amendment operates only to annul discriminations in existing constitutions and laws and to prohibit all future legislation denying or abridging the right of suffrage on account of race, color, and condition, and that the power of Congress to enforce it is, therefore, limited to legislation appropriate to the prevention and punishment of conduct based upon discriminating legislation.

"We think this too narrow a view of this article. Although it has reference to State and not individual action, it has a wider scope than the mere nullification or inhibition of State legislative action, and avoids and inhibits, not only State legislation, but all State action of every kind, and by every one assuming to exercise the power of the State, whether the State's authority be exceeded or not.

"When the Constitution speaks of a State and inhibits the doing of certain things, it sometimes includes under the term State every instrumentality or agency of the State which presumes to act by authority of the State, and in other cases the action of the State in its sovereign or legislative character is alone referred to.

"It is true that this amendment is not limited to the prohibition of '*laws*' denying or abridging the elective function. For this very reason we conclude that legislation

enforcing it may be corrective of any State action, whether based on State laws authorizing discrimination or not. With the exception of the first clause of the first section of the fourteenth amendment, that section is, like the fifteenth amendment, addressed broadly to the State. The other clauses of that section read as follows:

"'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

"Each of the clauses quoted above has been authoritatively construed as addressed to State action in some form and not to mere individual conduct.

> "Slaughter House case, 16 Wall., 36; *Ex parte* Virginia, 100 U. S., 339; United States *v.* Cruikshank, 92 U. S., 542; United States *v.* Harris, 106 U. S., 629, 638; Virginia *v.* Rives, 100 U. S., 313; Civil Rights case, 109 U. S., 3, 11; Chicago, B. & Q. R'd *v.* Chicago, 166 U. S., 226."

The court then quotes at length from these cases and continues:

"The principles of interpretation applicable to the first section of the fourteenth amendment are equally applicable to the construction of the fifteenth amendment.

"The right to vote in their own elections is derived from and secured by the laws of the State. The amendment simply limits State power in respect to suffrage at State elections by prohibiting discriminations in the enjoyment of the elective franchise on account of race, color, or condition.

"The right to vote in its own election can be conferred only by the State. No one, therefore, but the State can 'deny or abridge' the right to vote. The amendment is therefore

addressed to the State. Individuals may by unlawful force or fraud prevent an otherwise lawful voter from voting; but it would simply be an act of lawless violence. The right of suffrage would not be denied or abridged.

"Individuals cannot deny or abidge the right of suffrage for they cannot confer it. It is a right which is secured by and dependent upon law. Individuals cannot make, construe or administer law, they, therefore, cannot 'deny or abridge' a right of suffrage confirmed by law by a mere lawless act of fraud or intimidation or violence. To deny or abridge it in the sense and meaning of the fifteenth amendment there must be some act of the State, through its legislative, judicial or executive departments. Some one exercising the power of the State, whether with or without the sanction of the law of the State, must deny to otherwise qualified voters the right to vote on account of race, color or condition. That would be an act of the State and such act might be made an offense against the United States by virtue of the power granted by the fifteenth amendment. To justify legislation directed to the mere lawless acts of individuals, even though such acts be based upon color or race, would be to enter the domain of the police power of the State. We speak only of purely State elections, for the power of Congress over its own elections rests upon altogeter different principles.

"There is no more reason for assuming that this amendment authorizes legislation for the punishment of the ruffianly act of an individual in preventing the enjoyment of the right to vote in a State or municipal election, even though the intimidation be grounded upon race, color or previous condition of servitude, than there would be for legislation punishing a trespass upon property upon the ground that such a trespass would be a denial of due process of law. Both the fourteenth and the fifteenth amendments

are addressed to State action through some channel exercising the power of the State.

"Second. Appropriate legislation grounded on this amendment is legislation which is limited to the subject of discrimination on account of race, color or condition. The act commonly known as the enforcement act, being the act of May 31, 1870, 16 S. L., 140, contained a number of sections which were plainly intended to enforce the provisions of the fifteenth amendment. These sections were the first, third, fourth and fifth. The first has been carried into the Revised Statutes as section 2004. The third, having been held unconstitutional, is dropped out. The fourth, in a somewhat changed form, is carried into the Revised Statutes as section 5506, and the fifth section is section 5507 of the Revised Statutes. The third, fourth and fifth sections of that act have been held to have been in excess of the jurisdiction of the Congress under the fifteenth amendment, and therefore null and void. The ground upon which this conclusion was reached was that neither section was confined in its operation to discriminations on account of race, color or previous condition of servitude, and were broad enough to cover wrongful acts both within and without the jurisdiction of Congress under this article. United States *v.* Reese, 92 U. S., 214; Lackey *v.* United States, 46 C. C. A., 189."

It is apparent that while the circuit court of appeals in the Karem case was addressing itself to State elections, *that so far as the fifteenth amendment, and the power derived alone therefrom*, the reasoning is equally applicable and valid as to Federal elections, and as to limitations upon the United States Government as well as the State governments. In other words, as stated earlier, the fifteenth amendment applies to the Federal and State governments in exactly the same way, and it is only when considering other provisions

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of the Constitution that congressional power over Federal elections is enlarged beyond that existing as to State elections. We do not believe these views will be controverted by counsel for the Government. We turn, then, to a consideration of how Congress has exercised the powers it possesses, and it is here that the real issue between Government counsel and ourselves arises.

III.

It is not contended that there are any statutes relating to offenses at Federal elections other than sections 5507 and 5508. Section 5508 is a conspiracy section and is not involved here. The whole case, then, narrows down to the question of whether Congress has constitutionally exercised the power given it over offenses of bribery committed at Federal elections. That it has the power to make punishable such offenses we conceded in the fore part of this brief.

That section 5507 was intended to be appropriate legislation under the fifteenth amendment only is, we think, apparent. It was so regarded by the district judge below, and in the opinion of that court, referring to this section, it is said: "Is this appropriate legislation, and within the power of Congress, under section 2 of the fifteenth amendment"? (R., p. 18.) And nowhere in that opinion is there any attempt to base the constitutionality of the section upon other clauses of the Constitution. The circuit court of appeals in the Lackey case (46 C. C. A., 189) considered the section in the same light.

The language of the section shows plainly that it was in-

tended to apply to *all* elections, and was legislation meant to carry out the provisions of the fifteenth amendment. The section provides that—

"*Every person* who prevents, hinders, controls, or intimidates another from exercising or in exercising *the right of suffrage*, to whom that right is guaranteed by the *fifteenth amendment to the Constitution of the United States*, by means of bribery or threats of depriving such person of employment or occupation, or of ejecting such person from a rented house, lands, or other property, or by threats of refusing to renew leases or contracts for labor, or by threats of violence to himself or family, shall be punished as provided in the preceding section."

There are no words qualifying the words "right of suffrage" to Federal elections. It was intended to protect the suffrage at State elections as well as Federal. The reference to the fifteenth amendment plainly shows that Congress had in mind that amendment and was legislating as to all elections, for only under that amendment can Congress legislate as to State elections. If it had been meant to apply only to Federal elections, no reference would have been made to the fifteenth amendment, for without it Congress could so legislate. As well said by Judge Lurton in the Lackey case:

"It is not limited in its operation to congressional or presidential elections, nor to offenses grounded upon race, color or previous condition of servitude. Reading the section in connection with the other parts of the act from which it was taken, it is too obvious for discussion that Congress intended that it should have operation *in all elections*, and should not be limited to obstructions to the free exercise of the elective franchise based upon race, etc."

That the section is not appropriate legislation under the amendment, though based on it, is, we think, apparent. This was the exact question decided by the Lackey case, and the reason there given was "that section 5507 is void, as including within its operation offenses not grounded upon race, color, or previous condition of servitude."

The court took the position that the description of the persons against whom the offenses were committed, as those to whom the right of suffrage is "guaranteed by the fifteenth amendment," did not have the effect of limiting the offense to one based on race prejudice, &c. But there is another and an equally good reason why the section is not appropriate legislation, and that is that the section applies to *every person* who commits the offense and not simply to persons exercising some governmental function. The Karem case covers, in its reasoning, this point. But it will doubtless be urged that these objections relate only to State elections as those cases did; but we again urge that the real point is that these *limitations are the limitations of the fifteenth amendment*, and, because that is the only source of power as to State elections, are the limitations as to State election offenses. They are none the less limitations as to Federal elections, so far as the amendment is concerned.

Can, then, a statute that is based on the fifteenth amendment, and that is meant to apply to offenses committed at all elections, Federal and State, but which is not appropriate legislation under that amendment, and therefore not constitutional as to State election offenses, be limited by judicial construction to Federal elections and upheld by reference to powers granted Congress as to Federal elections only?

We believe the answer to this question is found in the

cases of United States *v.* Reese, 92 U. S., 214, and Trade-mark cases, 100 U. S., 82. The Reese case involved the constitutionality of sections 3 and 4 of the act of May 31, 1870. The indictment charged two inspectors of a municipal election in the State of Kentucky with refusing to receive the votes of certain colored voters in violation of said sections. In determining whether these sections were appropriate legislation under the fifteenth amendment, the court said:

"We are therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those which are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is whether we can introduce words of limitation into a penal statute so as to make specific, when as expressed, it is general only.

"It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the Government. The courts enforce

the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme, and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the States and the people.

"To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

This case was followed and approved in United States *v.* Harris, 106 U. S., 629. It may be urged that these cases were ones where the offense charged, or that could be charged, was narrower than the statute, whereas the case at bar, as charged in the indictment, is as broad as the statute, and that the statute can and indeed must be held to apply only to such cases, to wit, Federal election offenses. That this view is not the view of this court the trade-mark cases would seem to settle. In those cases indictments had been found against persons for having in their possession counterfeits of certain trade-marks and selling imitations of such trade-marks. Congress had undertaken to pass laws relative to trade-marks under the constitutional provisions relating to commerce, and had then made punishable violations of such laws. It had failed, however, to limit the trade-mark laws to interstate or foreign commerce, but made them cover all commerce. For that reason the acts were held unconstitutional. The court in its opinion (p. 98) said:

"*It has been suggested that if Congress has power to regulate trade-marks used in commerce with foreign nations and among the several States, these statutes shall be held valid in that class of cases, if no further.*

"To this there are two objections: First, the indictments in these cases do not show that the trade-marks which are wrongfully used were trade-marks used in that kind of commerce. Secondly, while it may be true that when one part of a statute is valid and constitutional and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable, so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body. This precise point was decided in United States *v.* Reese, 92 U. S., 214."

Section 5507 is a very different section in its scope and purpose from section 5508. This latter section is a general law that applies to a conspiracy to injure, &c., any person in the free exercise of a right secured to him by the Constitution and laws of the United States. It applies to all manner of rights other than those simply of suffrage. It is limited to a *Federal right*. No question could arise as to its constitutionality; the only question would be whether it applied to any given case, and since the statute is general and does not show that Congress intended it to apply to any particular state of facts, the question of whether it so applies becomes one of whether Congress had the power to legislate as to the particular case. If it did not, the conclusion is that section 5508 was not meant to cover such a case, the presumption being that Congress intended to pass a constitutional law. So we find the courts holding the section constitutional in Federal elections, as in the Yarbrough case, and holding it not to apply in State elections, as in the Karem case.

But section 5507 plainly applies to all elections, and it requires judicial construction in the face of its plain meaning to restrict it to Federal elections. The court must add the words "at a Federal election" to so narrow it; and this is just what this court has said may not be done. The only case not in accord with this position that we have found is that of United States *v.* Munford, in 16 Federal Reporter, 223. That court held section 5506 constitutional, and distinguished it from the Reese case by holding that when Congress re-enacted section 4 of the enforcement act as section 5506 it modified it sufficient to make that section apply only to Federal elections, "leaving out of it the words which, in the case of Reese, had been considered to bring it under the fifteenth amendment" (p. 227). Judge Hughes in his opinion, concurring, does perhaps go further than Judge Bond; but we submit that his opinion is not in full accord with the Reese case. It is to be remembered that section 5507 presents no such room for construction as section 5506; and even conceding Judge Hughes' position, the *direct reference to the fifteenth amendment* contained in section 5507 prevents the conclusion he thought warranted as to section 5506.

We respectfully submit that section 5507 is unconstitutional, and while Congress may provide for the punishment of bribery by an individual at congressional elections, it has not constitutionally done so, and that the judgment of the district court must be affirmed.

SWAGAR SHERLEY,
Counsel for Appellee.

W. B. DIXON,
Of Counsel.

APPENDIX.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

L. KAREM, *Plaintiff in Error*,
v.
UNITED STATES, *Defendant in Error.* } No. 1068.

Error to the district court of the United States for the western district of Kentucky.

Submitted Dec. 3, 1902; decided Feb. 3, 1903.

Before Lurton, Day, and Severens, circuit judges.

The plaintiff in error has been convicted under an indictment framed under section 5508 of the Revised Statutes. The indictment in substance charges:

That the plaintiff in error and C. H. Watson and G. P. Bohn and others, to the grand jury unknown, combined and conspired together to injure, oppress, threaten and intimidate certain named persons of color, citizens of the United States and of the State of Kentucky, and lawfully qualified voters under the law of Kentucky, from exercising and enjoying "a right and privilege secured to them * * * by the Constitution and laws of the United States, to wit:

"The right and privilege to vote at the election hereafter named without distinction of race, color or previous condition of servitude."

It is then averred that there was held within the State of Kentucky on November 7, 1899, an election for State and

municipal offices only and that at a certain named precinct the defendant Karem was a judge of election, C. H. Watson a clerk and G. P. Bohn the sheriff holding the election, and that the said persons of color were lawful voters in said precinct and legally entitled to vote at said election and that they each appeared at the polls within the time fixed by law and offered to vote in and at said election, but that in pursuance of the conspiracy aforesaid, the said defendant did prevent them from voting on account of their *race, color and previous condition of servitude.*

To this indictment the defendant Karem demurred upon the ground that the facts stated did not constitute an offense against the laws of the United States.

The demurrer was overruled.

The indictment was dismissed as to the alleged conspirator Bohn. The remaining defendants Karem and Watson entered pleas of not guilty. At the conclusion of all the evidence each of the defendants moved the court to instruct the jury to find against the Government. This motion was allowed as to Watson and disallowed as to Karem, who has sued out this writ to reverse a judgment based upon a verdict of guilty.

LURTON, circuit judge, after making the foregoing statement of the case, delivered the opinion of the court.

Many errors have been assigned and argued but inasmuch as we are of opinion that no offense was charged against the United States in the indictment it is wholly unnecessary to pass upon any of the other questions of either fact or law.

If Congress has not declared the acts charged to have been done by Karem to be an offense against the United States the courts have no power to treat them as such even though the Congress may have the constitutional power to make such acts a crime against the United States (United States *v.* Reese, 92 U. S., 214).

The contention of the Government is that the acts charged constitute an offense indictable and punishable under sections 2004 and 5508.

Those sections are in these words:

2004. "All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding."

5508. "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than $5000 and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

Neither the act from which section 2004 is taken nor any section of the Revised Statutes undertakes in terms to make its violation an offense against the United States or provide for any punishment.

It does nothing more than the amendment does *proprio vigore*. As said in *Ex parte* Yarbrough 110 U. S., 651, the amendment "annulled the discriminating word white," wherever it was found in a State constitution or election law "and thus placed the colored person in the enjoyment of the same right as white persons."

"And," said Justice Miller, in the same case, "such would be the effect of any future constitutional provision of a State

which should give the right of voting exclusively to white people whether they be men or women."

But if section 2004 be regarded as anything more than a declaration of the effect of the fifteenth amendment no penalty is provided for its violation.

In United States *v.* Reese, 92 U. S., 214, 216, the court said:

"If Congress has not declared an act done within a State to be a crime against the United States, the courts have no power to treat it as such."

Referring to this section 2004, then the first section of the act of 1870, the court said:

"It is not claimed that there is any statute which can reach this case unless it be the one in question. Looking, then, to this statute, we find that its first section provides that all citizens of the United States, who are or shall be otherwise qualified by law to vote at any election * * * shall be entitled and allowed to vote thereat, without distinction of race, color, or previous condition of servitude, any constitution * * * of the State to the contrary notwithstanding. This simply declares a right without providing a punishment for its violation."

The indictment in this case must therefore be predicated wholly upon section 5508 or the acts charged have not been constituted an offense punishable by the United States. But the constitutional authority for the legislation embodied in this section is very much broader than the fifteenth amendment. It was the sixth section of the enforcement act of 1870. The character of the "rights and privileges" protected is best illustrated by some of the cases in which it has been construed and enforced. The right of a qualified voter to vote for a member of Congress is a right "secured by the Constitution or laws of the United States" within the meaning of section 5508 of the Revised Statutes (*Ex Parte* Yarbrough, 110 U. S., 651).

In the case cited the indictment was brought under sections 5508 and 5520 of the Revised Statutes. The indictment in that case charged that the conspiracy was to deprive certain qualified colored voters on account of their color, race or previous condition of servitude "of the enjoyment of the right and privileges of suffrage in the election of a lawfully qualified person as a member of the Congress of the United States * * * which said right and privilege of suffrage was secured to the said Berry Saunders by the Constitution and laws of the United States."

The Supreme Court held that the right to vote in a congressional election was a right secured by and dependent upon the Constitution and laws of the United States.

In Lackey v. United States, 46 C. C. A., 189, after quoting from the opinion the argument for that conclusion, we said:

"The judgment of the court was also rested, in part, upon the broader ground that the Congress had the general implied power to protect the elections on which its existence depends from violence and corruption.

"But all that is said in that case upon this aspect of the question was said of elections at which electors or Congressmen are to be chosen, and of the direct interest of the United States in securing such elections from violence, corruption and fraud. But whether the power of Congress to legislate in respect to congressional elections depends upon the effect of the second and fourth sections of article 1 of the Constitution, or arises out of the implied power to protect such elections against violence and fraud because they are Federal elections so far as Federal officials are thereby directly chosen, it is very obvious that, whether such power be attributed to either the one or the other source, it furnishes no reason for any interference at a purely State election."

In Waddell v. United States, 112 U. S., 76, an indictment under this section was also sustained. "The particular right held in that case to be dependent on and secured by the laws of the United States, and to be protected by section 5508 of the Revised Statutes against interference by individuals, was

the right of a citizen, having made a homestead entry on public land, within the limits of the State, to continue to reside on the land for five years, for the purpose of protecting his title."

In Logan *v.* United States, 144 U. S., 263, it was held that a citizen of the United States, in the custody of a marshal of the United States under a lawful commitment to answer an offense against the United States, has the right to be protected by the United States against lawless violence, and that this right is a right secured to him by the Constitution and laws of the United States and that a conspiracy to prevent his enjoyment of this right of protection is indictable under section 5508.

None of the cases in which an indictment under this section has been sustained involved a discrimination against voters in a purely State election on account of race, color, or previous condition of servitude.

It is plain that resort can be had to this section only upon the theory that the right to vote at a purely State election is a right or privilege secured by the Constitution or laws of the United States.

But the power of Congress to legislate at all upon the subject of voting at purely State elections is entirely dependent upon the fifteenth amendment (United States *v.* Reese, 92 U. S., 214; United States *v.* Cruikshank, 92 U. S., 542).

The plain purpose of that amendment was to prevent all discrimination by the United States and by the States in the exercise of the suffrage on account of " race, color or previous condition of servitude."

The amendment reads thus:

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have the power to enforce this article by appropriate legislation.

The well-settled construction of the article is that it does not confer the right of suffrage upon any one (United States *v.* Reese, 92 U. S., 214; United States *v.* Cruikshank, 92 U. S., 542).

In the case last cited the opinion in the circuit court was by Justice Bradley and is reported as U. S. *v.* Cruikshank, 1 Woods, 308, and Federal Cases No. 14897.

In the opinion referred to the learned justice referring to the amendment, said:

"It does not confer the right to vote. That is the prerogative of the State laws. It only confers a right not to be excluded from voting by reason of race, color, or previous condition of servitude, and this is all the right that Congress can enforce."

Referring to the power of Congress to enforce this amendment by appropriate legislation, he said:

"It is not the right to vote which is guaranteed to all citizens. Congress cannot interfere with the regulation of that right by the States except to prevent by appropriate legislation any distinction as to race, color, or previous condition of servitude. The State may establish any other conditions and discriminations it pleases, whether as to age, sex, property, education, or anything else."

In United States *v.* Reese, cited above, the court said:

"The fifteenth amendment does not confer the right of suffrage upon any one. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude. Before its adoption, this could be done. It was as much within the power of a State to exclude citizens of the United States from voting on account of race, etc., as it was on account of age, property, or education. Now it is not.

"If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment, there was no constitutional guaranty against this discrimination;

now there is. It follows that the amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. This, under the express provisions of the second section of the amendment, Congress may enforce by 'appropriate legislation.'"

In United States *v.* Cruikshank, cited above, the court said:

"In Minor *v.* Happersett, 21 Wall., 178, we decided that the Constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the States. In United States *v.* Reese *et al.*, *supra*, we hold that the fifteenth amendment has invested the citizens of the United States with a new constitutional right, which is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been."

The fourteenth * amendment is therefore a limitation upon the powers of the States in the execution of their otherwise unlimited right to prescribe the qualification of voters in their own elections, and the power of Congress to enforce this limitation is necessarily limited to legislation appropriate to the correction of any discrimination on account of race, color or condition. The affirmative right to vote in such elections is still dependent upon and secured by the Constitution and laws of the State, the power of the State

* Evidently a mistake; should be fifteenth.

to prescribe qualification being limited in only one particular.

The right of the voter not to be discriminated against at such elections on account of race or color, is the only right protected by this amendment, and that right is a very different right from the affirmative right to vote.

There are certain very obvious limitations upon the power of Congress to legislate for the enforcement of this article.

1st. Legislation authorized by the amendment must be addressed to State action in some form or through some agency.

2d. It must be limited to dealing with discrimination on account of race, color or condition.

These in their order:

First. That State and not individual action is the subject of this article would seem clear from many considerations.

The right to vote in a purely State election being, as we have seen, a right granted by and dependent upon the law of the State is therefore a right which can only be denied or abridged by the State.

The amendment is therefore in terms addressed to State action. Action by the United States and by the State in contravention of this right of non-discrimination on account of race, color or condition is inhibited. It has been argued that the amendment operates only to annul discriminations in existing constitutions and laws and to prohibit all future legislation denying or abridging the right of suffrage on account of race, color and condition, and that the power of Congress to enforce it is, therefore, limited to legislation appropriate to the prevention and punishment of conduct based upon discriminating legislation.

We think this too narrow a view of the article. Although it has reference to State and not individual action it has a wider scope than the mere nullification or inhibition of State

legislative action and avoids and inhibits, not only State legislation, but all State action of every kind and by every one assuming to exercise the power of the State, whether the State's authority be exceeded or not.

When the Constitution speaks of a State and inhibits the doing of certain things it sometimes includes under the term State every instrumentality or agency of the State which presumes to act by authority of the State, and in other cases the action of the State in its sovereign or legislative character is alone referrrd to.

It is true that this amendment is not limited to the prohibition of "*laws*" denying or abridging the elective function. For this very reason we conclude that legislation enforcing it may be corrective of any State action whether based on State laws authorizing discrimination or not. With the exception of the first clause of the first section of the fourteenth amendment that section is, like the fifteenth amendment, addressed broadly to the State.

The other clauses of that section read as follows:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Each of the clauses quoted above has been authoritatively construed as addressed to State action in some form and not to mere individual conduct.

Slaughter House case, 16 Wall., 36; *Ex parte* Virginia, 100 U. S., 339; United States *v.* Cruikshank, 92 U. S., 542; United States *v.* Harris, 106 U. S., 629, 638; Virginia *v.* Rives, 100 U. S., 313; Civil Rights case, 109 U. S., 3, 11; Chicago, B. & Q. R'd *v.* Chicago, 166 U. S., 226.

In United States *v.* Cruikshank, the Chief Justice said:

"The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property without due process of law, or from denying to any person the equal protection of the laws; but this provision does not add anything to the rights of one citizen against another. It simply furnishes an additional guarantee against any encroachment by the State upon the fundamental rights which belong to every citizen as a member of society."

In Virginia *v.* Rives, the court said:

"The provisions of the fourteenth amendment here refer to State action exclusively and not to any action of private individuals."

In United States *v.* Harris, Justice Woods, after citing and commenting upon the earlier cases, said of the fourteenth amendment:

"The language of the amendment does not leave this subject in doubt. When the State has been guilty of no violation of its provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person within its jurisdiction the equal protection of the law; when on the contrary, the laws of the State, as enacted by its legislative and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress."

Referring to *Ex parte* Virginia, 100 U. S., 15, where a law of Congress prohibiting discrimination in jury service on account of race, color, etc., was upheld as warranted by the last clause of the first section of the fourteenth amendment, the court in the Civil Rights case, 109 U. S., 3, 11, said:

"In *Ex parte* Virginia, 100 U. S., 339, it was held that an indictment against a State officer under this section for ex-

cluding persons of color from the jury list is sustainable. But a moment's attention to its terms will show that the section is entirely corrective in its character. Disqualifications for service on juries are only created by the law, and the first part of the section is aimed at certain disqualifying laws namely, those which make mere race or color a disqualification; and the second clause is directed against those who, assuming to use the authority of the State government, carry into effect such a rule of disqualification. In the Virginia case, the State, through its officer, enforced a rule of disqualification which the law was intended to abrogate and counteract.

"Whether the statute book of the State actually laid down any such rule of disqualification or not, the State, through its officer, enforced such a rule; and it is against such State action, through its officers or agents, that the last clause of the section is directed.

"The aspect of the law was deemed sufficient to divest it of any unconstitutional character, and makes it differ widely from the first and second sections of the same act which we are now considering."

In Chicago, Burlington & Quincy R'd *v.* Chicago, 166 U. S., 226, it is said, referring to the fourteenth amendment:

"That the prohibitions of the amendment refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a State government deprives another of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition; and as he acts in the main and for the State, is clothed with the State's power, his act is that of the State."

In Logan *v.* United States, 144 U. S., 263, 293, the cases cited above were reviewed and the doctrine to be deduced from them thus formulated:

"The whole scope and effect of this series of decisions is that, while certain fundamental rights, recognized and declared, but not granted or created, in some of the amendments to the Constitution, are thereby guaranteed only against violation or abridgment by the United States, or by

the States, as the case may be, and cannot therefore be affirmatively enforced by Congress against unlawful acts of individuals; yet that every right, created by, arising under or dependent upon, the Constitution of the United States, may be protected and enforced by Congress by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object."

The principles of interpretation applicable to the first section of the fourteenth amendment are equally applicable to the construction of the fifteenth amendment.

The right to vote in their own elections is derived from and secured by the laws of the State. The amendment simply limits State power in respect to suffrage at State elections by prohibiting discrimination in the enjoyment of the elective franchise on account of race, color or condition. The right to vote in its own election can be conferred only by the State. No one, therefore, but the State can "deny or abridge" the right to vote. The amendment is therefore addressed to the State. Individuals may by unlawful force, or fraud prevent an otherwise lawful voter from voting. But it would simply be an act of lawless violence. The right of suffrage would not be denied or abridged. Individuals cannot deny or abridge the right of suffrage for they cannot confer it. It is a right which is secured by and dependent upon law. Individuals cannot make, construe or administer law; they, therefore, cannot "deny or abridge" a right of suffrage confirmed by law by a mere lawless act of fraud or intimidation or violence. To deny or abridge it in the sense and meaning of the fifteenth amendment there must be some act of the State, through its legislative, judicial or executive departments. Some one exercising the power of the State, whether with or without the sanction of the law of the State, must deny to otherwise qualified voters the right to vote on account of race, color or condition.

That would be an act of the State and such act might be made an offense against the United States by virtue of the power granted by the fifteenth amendment. To justify legislation directed to the mere lawless acts of individuals, even though such acts be based upon color or race, would be to enter the domain of the police power of the State. We speak only of purely State elections for the power of Congress over its own elections rests upon altogether different principles.

There is no more reason for assuming that this amendment authorizes legislation for the punishment of the ruffianly act of an individual in preventing the enjoyment of the right to vote in a State or municipal election, even though the intimidation be grounded upon race, color or previous condition of servitude, than there would be for legislation punishing a trespass upon property upon the ground that such a trespass would be a denial of due process of law. Both the fourteenth and the fifteenth amendments are addressed to State action through some channel exercising the power of the State.

Second. Appropriate legislation grounded on this amendment is legislation which is limited to the subject of discrimination on account of race, color or condition.

The act commonly known as the enforcement act, being the act of May 31, 1870, 16 S. L., 140, contained a number of sections which were plainly intended to enforce the provisions of the fifteenth amendment. These sections were the first, third, fourth and fifth. The first has been carried into the Revised Statutes as section 2004. The third, having been held unconstitutional, is dropped out. The fourth, in a somewhat changed form, is carried into the Revised Statutes as section 5506, and the fifth section is section 5507 of the Revised Statutes. The third, fourth and fifth sections of that act have been held to have been in excess of the jurisdiction of the Congress under the fifteenth amendment and therefore null and void. The ground upon which this con-

clusion was reached was that neither section was confined in its operation to discriminations on account of race, color, or previous condition of servitude, and were broad enough to cover wrongful acts both within and without the jurisdiction of Congress under the article (United States *v.* Reese, 92 U. S., 214; Lackey *v.* United States, 46 C. C. A., 189).

Third. It may be conceded that the Congress has power to provide for the indictment and punishment of any person exercising the power of the State who should exclude on account of race, color or previous condition of servitude the vote of lawfully qualified voters even at a purely State election.

But has Congress so legislated?

Section 5508 is plainly not limited to acts done by persons acting under and exercising the power of the State. The indictment charges that the defendant conspirators were officers of election and as such officers, excluded colored voters from voting on account of race, color, etc.

If the case made by the indictment is within this section it is not because it provides specifically for the punishment of the offense charged, but because it comes under the general provision providing for the punishment of any unlawful interference with the free enjoyment of some right or privilege secured by the Constitution or laws of the United States.

This section has for its object the punishment of all persons who conspire to prevent the free enjoyment of any right or privilege secured by the Constitution or laws of Congress without regard to whether the persons so conspiring are private individuals or officials exercising the power of the United States or of a State. Neither does it draw any distinction between a conspiracy directed against the exercise of the right of suffrage based upon race or color, and a conspiracy not so grounded. It is therefore not legislation appropriate to the enforcement of the fifteenth amendment; and if the only warrant for its enactment was that article we

should be obliged to hold that Congress had exceeded its jurisdiction because broad enough to cover wrongful acts without as well as within its jurisdiction. That it is not within the province of the courts to so limit an act by judicial construction as to make it operate only on that which Congress may rightfully prohibit and punish is now a well-settled principle of constitutional interpretation.

> United States *v.* Reese, 92 U. S., 214; United States *v.* Cruikshank, 92 U. S., 542; Trade-mark Cases, 100 U. S., 82; United States *v.* Harris, 106 U. S., 629; Civil Rights Cases, 109 U. S., 3; Lackey *v.* United States, 46 C. C. A., 189.

The case of United States *v.* Reese, above cited, is very much in point. The court had under consideration the constitutionality of sections 3 and 4 of the act of May 31, 1870, now constituting section 5506 of the Revised Statutes.

The indictment charged two inspectors of a municipal election in the State of Kentucky with refusing to receive the votes of certain colored voters in contravention of the terms of the third section of the act.

The section in question was directed to the conduct of election judges and inspectors, but did not limit the operation of the act to exclusions from suffrage on account of race, color or condition.

The court said in speaking of the section then under consideration:

"We find there no words of limitation, or reference even, that can be construed as manifesting any intention to confine its provisions to the terms of the fifteenth amendment. That section has for its object the punishment of all persons, who, by force, bribery, &c., hinder, delay, &c., any person from qualifying or voting. In view of all these facts, we feel compelled to say, that, in our opinion, the language of the third and fourth sections does not confine their operation to unlawful discriminations on account of race, &c. If Congress had the power to provide generally for the punishment of

those who unlawfully interfere to prevent the exercise of the elective franchise without regard to such discrimination, the language of these sections would be broad enough for that purpose.

"It remains now to consider whether a statute, so general as this in its provisions, can be made available for the punishment of those who may be guilty of unlawful discrimination against citizens of the United States, while exercising the elective franchise, on account of their race, &c.

"There is no attempt in the sections now under consideration to provide specifically for such an offense. If the case is provided for at all, it is because it comes under the general prohibition against any wrongful act or unlawful obstruction in this particular. We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those which are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is whether we can introduce words of limitation into a penal statute so as to make specific, when, as expressed, it is general only.

"It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the Government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme, and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts

that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the States and the people.

"To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.

"We must, therefore, decide that Congress has not as yet provided by 'appropriate legislation' for the punishment of the offense charged in the indictment; and that the circuit court properly sustained the demurrers, and gave judgment for the defendants."

In United States v. Harris, 106 U. S., 629, 637, section 5519 was held void as not warranted by the Constitution. That section is in these words:

"SECTION 5519. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory giving or securing to all persons within such State or Territory the equal protection of the laws; each of such persons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment."

It was sought to be supported under the thirteenth, fourteenth, and fifteenth amendments. The court said:

"It is clear that the fifteenth amendment can have no application. That amendment, as was said by this court in the case of United States v. Reese, 92 U. S., 214, 'relates to the right of citizens of the United States to vote. It does not confer the right of suffrage on any one. It merely invests citizens of the United States with the constitutional right of exemption from discrimination in the enjoyment of the elec-

tive franchise on account of race, color, or previous condition of servitude.' (See also United States *v.* Cruikshank, *id.*, 542; s. c., 1 Woods, 308.) Section 5519 of the Revised Statutes has no reference to this right. The right guaranteed by the fifteenth amendment is protected by other legislation of Congress, namely, by sections 4 and 5 of the act of May 31, 1870, c. 114, and now embodied in sections 5506 and 5507, Revised Statutes.

"Section 5519 according to the theory of the prosecution, and as appears by its terms, was framed to protect from invasion by private persons, the equal privileges and immunities under the laws, of all persons and classes of persons. It requires no argument to show that such a law cannot be founded on a clause of the Constitution whose sole object is to protect from denial or abridgment, by the United States or States, on account of race, color or previous condition of servitude, the right of citizens of the United States to vote."

The court further held that the act was not warranted by either of the other amendments, because it covered cases both within and without the authority of Congress.

Referring to the claim that it might be supported by the fourteenth amendment the court said:

"As, therefore, the section of the law under consideration is directed exclusively against the action of private persons without reference to the laws of the State or their administration by her officers, we are clear in the opinion that it is not warranted by any clause of the fourteenth amendment.',

Assuming that exemption from discrimination at a State election is a "right or privilege secured by the Constitution or laws of the United States" it is a right which originates only in the fifteenth amendment and can only be enforced by legislation directed to State action in some form by which otherwise qualified voters are denied the elective franchise on account of race, or color. This is the limit of the power of Congress under the article.

Section 5508 is not so limited and is not, therefore, appropriate legislation for the enforcement of the fifteenth

amendment. The warrant for the section is found in other provisions of the Constitution, and other sections of the act of 1870, from which this section was taken, carried into the Revised Statutes as sections 5506 and 5507 were intended to enforce this amendment.

We therefore conclude that the offense charged in the indictment is not included within or covered by section 5508.

The judgment must be reversed with directions to sustain the defendants' demurrer to the indictment.

Supreme Court of the United States.

No. 213.—October Term, 1902.

A. D. James, United States Marshal for the Western District of Kentucky, and The United States, Appellants,
vs.
Henry Bowman.

Appeal from the District Court of the United States for the Western District of Kentucky.

[May 4, 1903.]

In December, 1900, an indictment was found by the United States District Court for the District of Kentucky against the appellee, Henry Bowman, and one Harry Weaver, based upon section 5507 of the Revised Statutes of the United States. The indictment charged in substance that certain "men of African descent, colored men, negroes, and not white men," being citizens of Kentucky and of the United States, were, by means of bribery, unlawfully and feloniously intimidated and prevented from exercising their lawful right of voting at a certain election held in the Fifth Congressional District of Kentucky on the 8th day of November, 1898, for the election of a Representative in the Fifty-sixth Congress of the United States.

No allegation is made that the bribery was because of the race, color or previous condition of servitude of the men bribed. The appellee, Henry Bowman, having been arrested and held in default of bail, sued out a writ of *habeas corpus* on the ground of the unconstitutionality of section 5507. The district judge granted the writ, following reluctantly the decision of the Circuit Court of Appeals for the Sixth Circuit, in *Lackey* v. *United States*, (46 C. C. A. 189; 107 Fed. Rep. 114.) From that judgment the Government has taken this appeal.

Section 5507 is as follows:

"Sec. 5507. Every person who prevents, hinders, controls or intimidates another from exercising, or in exercising the right of suffrage, to whom that right is guaranteed by the Fifteenth Amendment to the Constitution of the United States, by means of bribery or threats of depriving such person of employment or occupation, or of ejecting such person from a rented house, lands or other property, or by threats of refusing to renew leases or contracts for labor, or by threats of violence to himself or family, shall be punished as provided in the preceding section."

The Fifteenth Amendment provides:

"SEC. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude.

"SEC. 2. The Congress shall have power to enforce this article by appropriate legislation."

Mr. Justice BREWER delivered the opinion of the Court.

The single question presented for our consideration is whether section 5507 can be upheld as a valid enactment, for if not, the indictment must also fall, and the defendant was rightfully discharged. On its face the section purports to be an exercise of the power granted to Congress by the Fifteenth Amendment, for it declares a punishment upon any one who by means of bribery prevents another to whom the right of suffrage is guaranteed by such amendment from exercising that right. But that amendment relates solely to action "by the United States or by any State," and does not contemplate wrongful individual acts. It is in this respect similar to the following clauses in the Fourteenth Amendment:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Each of these clauses has been often held to relate to action by a State and not by individuals. As said in *Virginia* v. *Rives*, (100 U. S. 313, 318):

"The provisions of the Fourteenth Amendment of the Constitution we have quoted all have reference to State action exclusively, and not to any action of private individuals."

Again, in *Ex parte Virginia*, (100 U. S. 339, 346):

"They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws."

Again, in *United States* v. *Cruikshank*, (92 U. S. 542, 554):

"The Fourteenth Amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which proceeds it, and which we have just considered, add anything to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government

is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty."

In *Civil Rights Cases*, (109 U. S. 3, 13):

"And so in the present case, until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity; for the prohibitions of the amendment are against State laws and acts done under State authority. Of course, legislation may, and should be, provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, State laws, or State action of some kind, adverse to the rights of the citizen secured by the amendment. Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State legislatures and to supersede them. It is absurd to affirm that, because the rights of life, liberty and property (which include all civil rights that men have) are by the amendment sought to be protected against invasion on the part of the State without due process of law, Congress may therefore provide due process of law for their vindication in every case; and that, because the denial by a State to any persons of the equal protection of the laws is prohibited by the amendment, therefore Congress may establish laws for their equal protection. In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation; that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which, by the amendment, they are prohibited from committing or taking."

United States v. *Harris*, (106 U. S. 629, 639):

"The language of the amendment does not leave this subject in doubt. When the State has been guilty of no violation of its provision; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the State, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress."

See also *Slaughter-House Cases*, (16 Wall. 36;) *Scott* v. *McNeal*, (154 U. S. 34, 45;) *Chicago, Burlington &c. Railroad* v. *Chicago*, (166 U. S. 226, 233.)

But we are not left alone to this reasoning from analogy. The Fifteenth Amendment itself has been considered by this court and the same limitations placed upon its provisions. In *United States* v. *Reese*, (92 U. S. 214, 217,) we said:

"The Fifteenth Amendment does not confer the right of suffrage upon any one. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color or previous condition of servitude. Before its adoption this could be done. It was as much within the power of a State to exclude citizens of the United States from voting on account of race, &c., as it was on account of age, property or education. Now it is not. If a citizen of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment, there was no constitutional guaranty against this discrimination; now there is. It follows that the amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude. This, under the express provisions of the second section of the amendment, Congress may enforce by 'appropriate legislation.'"

In passing it may be noticed that this indictment charges no wrong done by the State of Kentucky, or by any one acting under its authority. The matter complained of was purely an individual act of the defendant. Nor is it charged that the bribery was on account of race, color or previous condition of servitude. True, the parties who were bribed were alleged to be "men of African descent, colored men, negroes, and not white men," and again, that they were "persons to whom the right of suffrage and the right to vote was then and there guaranteed by the Fifteenth Amendment to the Constitution of the United States." But this merely describes the parties wronged as within the classes named in the amendment. They were not bribed because they were colored men, but because they were voters. No discrimination on account of race, color or previous condition of servitude is charged.

These authorities show that a statute which purports to punish purely individual action cannot be sustained as an appropriate exercise of the power conferred by the Fifteenth Amendment upon Congress to prevent action by the State through some one or more of its official representatives, and that an indictment which charges no discrimination on account of race, color or previous condition of servitude is likewise destitute of support by such amendment.

But the contention most earnestly pressed is that Congress has ample power in respect to elections of Representatives in Congress; that the election which was held, and at which this bribery took place, was such an election; and that therefore under such general power this statute and this indictment can be sustained. The difficulty with this contention is that Congress has not by this section acted in the exercise of such power. It is not legislation in respect to elections of Federal officers, but is levelled at all elections, State or Federal, and it does not purport to punish bribery of any voter, but simply of those named in the Fifteenth Amendment. On its face it is clearly an attempt to exercise power supposed to be conferred by the Fifteenth Amendment in respect to all elections, and not in pursuance of the general control by Congress over particular elections. To change this statute, enacted to punish bribery of persons named in the Fifteenth Amendment at all elections, to a statute punishing bribery of any voter at certain elections would be in effect judicial legislation. It would be wresting the statute from the purpose with which it was enacted and making it serve another purpose. Doubless even a criminal statute may be good in part and bad in part, providing the two can be clearly separated, and it is apparent that the legislative body would have enacted the one without the other, but there are no two parts to this statute. If the contention be sustained it is simply a transformation of the statute in its single purpose and scope. This question has been by this court in two cases carefully considered and fully determined. In *United States* v. *Reese*, *supra*, there was an indictment, one count of which was based upon the third and another upon the fourth section of the act of May 31, 1870, (16 Stat. 140,) the fifth section of which act is substantially repeated in section 5507, Rev. Stat. It is true that, as stated, section four contains "no words of limitation or reference even that can be construed as manifesting any intention to confine its provisions to the terms of the Fifteenth Amendment. That section has for its object the punishment of all persons who by force, bribery, &c., hinder, delay, &c., any person from qualifying or voting." And it is also true that the government expressly waived the consideration of all claims not arising out of the enforcement of the Fifteenth Amendment to the Constitution. Nevertheless the decision is directly in point. We said (p. 221):

"We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The

proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

"It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. . . . To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

Again, in the *Trade-Mark Cases*, (100 U. S. 82,) the validity of an indictment under the fourth and fifth sections of the act of Congress to punish the counterfeiting of trade-marks (19 Stat. 141) was considered. The Congressional enactments at that time attempted to authorize trade-marks generally, and the statute referred to was equally general. It was held that under the Constitution, Congress did not have control over the subject of trade-marks generally, and, referring to the contention that to a limited extent it had, we said (p. 98):

"It has been suggested that if Congress has power to regulate trade-marks used in commerce with foreign nations and among the several States, these statutes shall be held valid in that class of cases, if no further. . . . While it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable, so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body. This precise point was decided in *United States* v. *Reese*, (92 U. S. 214.) In that case Congress had passed a statute punishing election officers who should refuse to any person lawfully entitled to do so the right to cast his vote at an election. This court was of the opinion that, as regarded the section of the statute then under consideration, Congress could only punish such denial when it was on account of race, color or previous condition of servitude. It was urged, however, that the general description of the offense included the more limited one, and that the section was valid where such was in fact the cause of denial. But the court said" (and then follows the quotation we have already made from that case.)

We deem it unnecessary to add anything to the views expressed in these opinions. We are fully sensible of the great wrong which results from bribery at elections, and do not question the power of Congress to punish such offenses when committed in respect to the election of Federal officials. At the same time it is all-important that a criminal statute should define clearly the offense which it purports to punish, and that when so

defined it should be within the limits of the power of the legislative body enacting it. Congress has no power to punish bribery at all elections. The limits of its power are in respect to elections in which the nation is directly interested, or in which some mandate of the national constitution is disobeyed, and courts are not at liberty to take a criminal statute, broad and comprehensive in its terms and in these terms beyond the power of Congress, and change it to fix some particular transaction which Congress might have legislated for if it had seen fit.

The judgment of the District Court is *Affirmed.*

Mr. Justice McKENNA took no part in the decision of this case.

Mr. Justice HARLAN and Mr. Justice BROWN dissented.

True copy.

Test:

Clerk Supreme Court, U. S.